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Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

Note by the Secretariat

In her report, prepared pursuant to Human Rights Council resolutions 7/13 and 34/16, the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material provides an overview of her activities since her previous report, presented to the Council in March 2017. The report also contains a thematic study on surrogacy and sale of children, and recommendations on how to uphold the prohibition of, and how to prevent, the sale of children.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolutions 7/13 and 34/16. It contains information on the activities of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material since her previous report, which was presented to the Human Rights Council in March 2017. It also contains a thematic study on surrogacy and sale of children.

II. Activities

A. Country visits

2. The Special Rapporteur undertook a visit to the Dominican Republic from 8 to 15 May 2017.[1] She also conducted a visit to the Lao People's Democratic Republic, from 8 to 16 November 2017.[2] The report of the visit to the Lao People's Democratic Republic will be presented to the Human Rights Council at its fortieth session. The Special Rapporteur thanks both Governments for their cooperation before and during the visit.

3. The Government of Ireland has agreed to a visit of the Special Rapporteur from 14 to 21 May 2018, and the Government of Malaysia has accepted a visit from 24 September to 1 October 2018. The Special Rapporteur thanks both Governments for accepting the visits and looks forward to a constructive dialogue in the preparation for both missions. She also invites the Government of India to propose dates for a visit in 2019.

B. Other activities

1. Conferences and engagement with stakeholders[3]

4. On 4 October 2017, the Special Rapporteur chaired a session on child sexual abuse online, at the World Congress on Child Dignity in the Digital World, organized by the Centre for Child Protection of the Pontifical Gregorian University in Rome.

5. On 10 October 2017, the Special Rapporteur and the Special Rapporteur on trafficking in persons, especially women and children, presented their joint report on vulnerabilities of children to sale, trafficking, and other forms of exploitation in situations of conflict and humanitarian crisis, to the General Assembly at its seventy-second session.[4] On 11 October 2017, she participated in a panel discussion on preventing violence against children and helping to focus efforts and track progress on the implementation of target 16.2 of the 2030 Agenda for Sustainable Development, which was organized by the United Nations Children's Fund (UNICEF), and by the Delegation of the European Union to the United Nations and the Permanent Mission of Uruguay to the United Nations, in New York.

2. Communications

6. Summaries of six communications sent by the Special Rapporteur during the reporting period appear in the communications reports of special procedures.

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[1] See A/HRC/37/60/Add.1.

[2] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22416&LangID=E.

[3] For activities of the Special Rapporteur between February and July 2017, see A/72/164.

[4] See A/72/164.

III. Study on surrogacy and sale of children

A. Objective, scope and methodology

7. The mandate of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material includes "matters relating to the sale of children".[5] The Special Rapporteur's last two reports have addressed a "gap" that arose when inadequate attention had been given to issues beyond "the sexual exploitation of children".[6] Hence, the Special Rapporteur's report to the General Assembly at its seventy-first session focused on the sale of children for the purpose of forced labour[7] and her report to the Human Rights Council at its thirty-fourth session focused on illegal adoptions.[8]

8. The present study addresses a further such "gap", regarding the sale of children in the context of surrogacy. It is a logical follow-up to the study on illegal adoptions, wherein the Special Rapporteur already noted that "the international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children".[9] The Committee on the Rights of the Child has consistently expressed similar concerns that surrogacy could lead or amount to the sale of children.[10]

9. The present study therefore examines when surrogacy arrangements constitute the sale of children under international human rights law and as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It reviews the wide spectrum of policies on surrogacy, in a context where explicit and specific international norms are currently lacking. The study notes the presence of abusive practices in both unregulated and regulated contexts. In order to strengthen the legitimacy and viability of the fundamental norm prohibiting the sale of children, the study provides analysis and recommendations on implementing this prohibition as it relates to surrogacy.

10. "Surrogacy" refers to a form of "third party" reproductive practice in which the intending parent(s) and the surrogate mother agree that the surrogate mother will become pregnant, gestate, and give birth to a child. Surrogacy arrangements generally include an expectation or agreement that the surrogate mother will legally and physically transfer the child to the intending parent(s) without retaining parentage or parental responsibility.[11] Surrogacy generally occurs in the context of assisted reproductive technologies — such as in vitro fertilization and embryo transfer for gestational (or full) surrogacy (where the surrogate mother is genetically unrelated to the child) and artificial insemination for traditional (or partial) surrogacy (where the surrogate mother is genetically related to the child). Gametes can also be obtained, by purchase or "donation", from additional parties who are neither the intending parent(s) nor the surrogate mother, and hence the intending parent(s) may or may not be genetically related to the child.[12]

11. The analysis of sale of children that is contained in the present study is applicable to both international and national surrogacy, traditional and gestational surrogacy, and commercial and altruistic surrogacy. The study concentrates on the prohibition of sale of

[5] See Commission on Human Rights resolution 1990/68.

[6] See A/71/261, para. 15.

[7] Ibid., para. 16.

[8] See A/HRC/34/55.

[9] Ibid., para. 52.

[10] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[11] See the Hague Conference on Private International Law (HCCH), "A preliminary report on the issues arising from international surrogacy arrangements" (March 2012), available at https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf.

[12] Ibid. It would also be traditional surrogacy if in vitro fertilization and embryo transfer were used employing the surrogate mother's eggs.

children and child rights as per international standards and protection issues that arise under contemporary surrogacy practice. The implications of surrogacy for women's rights is beyond the scope of the present study, except as regards issues that affect both children's rights and women's rights, or certain clear rights violations that illuminate regulatory or enforcement issues. The Special Rapporteur echoes the position of other human rights experts who have stated that discrimination against women, through the instrumentalization of their bodies for cultural, political, economic and other purposes, including when rooted in patriarchal conservatism, cannot be accepted.[13] The Special Rapporteur encourages other human rights mechanisms and United Nations entities to contribute with further research to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations. Nothing in the present report should be interpreted as a restriction of women's autonomy in decision-making or of their rights to sexual and reproductive health.

12. The study benefited from contributions by international experts and relevant international organizations. The Special Rapporteur organized an expert meeting on surrogacy in Geneva on 1 November 2017. The Special Rapporteur also participated in an expert meeting on surrogacy convened by the International Social Service in May 2017 at the Department of Law of the University of Verona, Italy. The Special Rapporteur particularly wants to thank members of the core expert group of the International Social Service surrogacy project for contributions in developing the study. The Special Rapporteur has benefited from reviewing the work of the Committee on the Rights of the Child, the Council of Europe and the Hague Conference on Private International Law. The Special Rapporteur has also gained insight from her missions to various countries.

B. Urgent concerns

13. Surrogacy as a reproductive practice is on the rise. Indeed, as intercountry adoptions have fallen in number and increasingly become subject to international standards, the numbers of international surrogacy arrangements have rapidly increased in the absence of international standards.[14] Therefore, surrogacy, like intercountry adoption in the 1980s and 1990s, has emerged as an area of concern where a demand-driven system may endanger the rights of children.[15] There is also "unease" and concern that "the practice of engaging surrogates in States with emerging economies to bear children for more wealthy intending parents from other States has dimensions similar to those discussed in the preparatory reports on intercountry adoption".[16]

14. The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People's Democratic Republic, Nepal and Thailand.[17] However, California and other jurisdictions in the United States are centres for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of

[13] See A/HRC/32/44, para. 106 (a).

[14] See Katarina Trimmings and Paul Beaumont, eds., *International Surrogacy Arrangements* (2013), pp. 439, 441 and 442.

[15] See J.H.A. van Loon, "Report on intercountry adoption", preliminary document No. 1, sect. E, pp. 51–55, available at https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf; cf. HCCH, "A preliminary report on the issues arising from international surrogacy arrangements"; and see Chief Federal Magistrate Pascoe (Australia), "Intercountry surrogacy – a new form of trafficking?", available at www.austlii.edu.au/au/journals/FedJSchol/2012/15.pdf; and Chantal Sachet (International Social Service), "Children and adoption: which rights and whose?", UNICEF, *Innocenti Digest 4: Intercountry Adoption*, pp. 12–13.

[16] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 5 as well as footnote 28.

[17] See Trimmings and Beaumont, p. 472.

cross-border relationships.[18] In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States.[19] All of these patterns pose human rights concerns.

15. National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States).[20] The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational.[21] Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit "commercial", "for-profit" or "compensated" surrogacy, while explicitly or implicitly permitting "altruistic" surrogacy.[22] Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy.[23] Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices.[24] However, Georgia, the Russian Federation and Ukraine, and some states in the United States, have for a sustained period of time chosen to remain centres for international surrogacy arrangements.[25]

16. Laws governing surrogacy also vary across a spectrum from extensive to non-existent.[26] Although there are historical antecedents to surrogacy,[27] modern practices are related to the rise of assisted reproductive technologies, which not only offer new reproductive opportunities but also introduce new legal and ethical dilemmas. Hence, it is often said that the law is having difficulty keeping up with developing technologies and practices.[28] Many countries, for example Argentina, Belgium, Guatemala, Ireland and Japan,

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[18] Ibid., pp. 311–324, 357–366 and 464–469. See also HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", footnote 94; and HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements" (March 2014), para. 130, available at https://assets.hcch.net/docs/bb90cfd2-a66a-4fc4-a05b-55f33b009cfc.pdf; and *Re D (A Child)* (Surrogacy) [2014] EWHC 2121 (Fam) (Georgia).

[19] See footnotes 22–24 below.

[20] See Trimmings and Beaumont, pp. 25, 256 and 257; and Courtney Joslin (reporter), Uniform Parentage Act Drafting Committee (8 February 2016), pp. 3–6, available at www.uniformlaws.org/shared/docs/parentage/2016feb8_AUPA_Memo_Revision%20Drafting%20Committee%20Surrogacy.pdf.

[21] See Trimmings and Beaumont, pp. 119–142.

[22] Ibid., p. 454; HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 18; and Chief Judge John Pascoe (Australia), Third Annual Legalwise International Family Law Conference, Shanghai, China, 17–20 September 2014, available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/paper-pascoe-international-commercial-surrogacy.

[23] See Chief Judge John Pascoe (Australia), Third Annual Legalwise International Family Law Conference; and Trimmings and Beaumont, pp. 443–454.

[24] See "An update on the work of the Hague Conference on Private International Law", *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht*, No. 144 (2017); and Audrey Wilson, "How Asia's surrogate mothers became a cross-border business, *South China Morning Post*, available at www.scmp.com/week-asia/society/article/2096675/how-asias-surrogate-mothers-became-cross-border-business.

[25] See Trimmings and Beaumont, pp. 357–365 and 443. In regard to Georgia, see HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", footnote 94; HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements", para. 130; and *Re D (A Child)* (Surrogacy) [2014] EWHC 2121(Fam).

[26] See Trimmings and Beaumont, pp. 443–454.

[27] See David Smolin, "Surrogacy as the sale of children", *Pepperdine Law Review*, vol. 43 (2016), pp. 265 and 289–302, available at https://works.bepress.com/david_smolin/19/.

[28] See, for example, Chief Federal Magistrate Pascoe, "The rise of surrogate parenting", twenty-fourth Law Asia Conference, Seoul, Republic of Korea, 10 October 2011, at sect. 6 (quoting Justice

and many jurisdictions in the United States, have thus far failed to enact legislation concerning surrogacy, whether prohibitionist or permissive, leaving courts and competent authorities to develop their own responses to the developing practice of surrogacy.[29] In the absence of surrogacy-specific laws, surrogacy arrangements are often completed using pre-existing laws governing parentage, termination of parental rights and adoption.[30] Those jurisdictions which have legislated more explicitly as to surrogacy vary in the degree of comprehensiveness and clarity. The absence of clear and comprehensive laws addressing surrogacy can lead to unregulated commercial surrogacy developing, with accompanying exploitative practices.[31]

17. Intending parents often travel from jurisdictions prohibiting commercial surrogacy, such as Australia, France or Italy, to jurisdictions permitting commercial surrogacy, and then seek to return with surrogate-born children to their home jurisdiction. Such travel intentionally evades prohibitionist laws and creates dilemmas for the jurisdictions involved.[32] Competent authorities and courts are often placed in the situation of being asked to validate, after the fact, international surrogacy arrangements that are illegal in one or both jurisdictions.[33] The imperative to protect the rights of these surrogate-born children adds to the dilemma.[34] Sympathy for intending parents and their wish to engage in family formation further complicates the issues. Concern for surrogate mothers, especially those who are exercising agency in contexts that often are particularly vulnerable to exploitation due to poverty, powerlessness, a lack of education, and multiple forms of discrimination, sharpens the dilemmas faced by States.[35]

18. International commercial surrogacy networks swiftly move from jurisdiction to jurisdiction as laws change. Indeed, sometimes in vitro fertilization and embryo transfer are conducted in one State, and then the surrogate mother is moved to a second State for the birth, with the intending parent(s) coming from a third State.[36] Hence, the need for the development and implementation of international standards is clear.

19. These unresolved dilemmas have created urgent concerns both for States and for the international community. Some are primarily concerned with the dilemmas and impact on human rights produced when international surrogacy is conducted to evade national prohibitions. Others are primarily concerned with abusive practices that can occur due to the lack of governing international and/or national law. From this perspective, the required solution is international and national legal frameworks that clearly regulate surrogacy.[37]

20. Some recommend legalizing and regulating both altruistic and commercial surrogacy. The hope is that legalization combined with a regulatory framework would protect the rights, dignity and interests of all parties, while avoiding the harms and violations of underground

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Benjamin), available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2011/speech-pascoe-lawasia-2011.

[29] See Trimmings and Beaumont, pp. 5–24, 49–83, 167–174, 219–230, 247–253 and 391; and European Parliament, "A comparative study on the regime of surrogacy in EU member States" (2013), p. 206, available at www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2013)474403.

[30] Ibid.

[31] See sources cited in footnote 10 above; as well as Trimmings and Beaumont, p. 442; and HCCH, "A preliminary report on the issues arising from international surrogacy arrangements".

[32] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", paras. 25, 28, 31 and 32; and the European Court of Human Rights — *Mennesson v. France*, application No. 65192/11, judgment of 26 June 2014; *Labassee v. France*, application No. 65941/11, judgment of 26 June 2014; and Paradiso and *Campanelli v. Italy*, application No. 25358/12, Grand Chamber judgment of 24 January 2017.

[33] See HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements", para. 215.

[34] See *Re X and Y* (Foreign Surrogacy) [2008] EWHC 3030 (Fam), para. 22, per Justice Hedley.

[35] See HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements".

[36] See Audrey Wilson, "How Asia's surrogate mothers became a cross-border business".

[37] See HCCH — "A preliminary report on the issues arising from international surrogacy arrangements" and "A study of legal parentage and the issues arising from international surrogacy arrangements".

or unregulated surrogacy practice. Others argue for prohibiting all forms of surrogacy, based on human dignity concerns, or on the view that surrogacy is inherently exploitative or that in current contexts of power imbalance it is usually exploitative. The most frequently preferred answer, as indicated by State legislation and practice, has been to prohibit commercial surrogacy while permitting altruistic surrogacy, based on the viewpoint that commercial surrogacy commonly commodifies children and exploits surrogate mothers.[38] The inability of the Council of Europe to adopt a position exemplifies the depth of the conflict, as an overwhelming majority favoured either prohibiting commercial surrogacy or prohibiting all surrogacy, and yet ultimately no position was adopted due to the split between those positions.[39]

21. Even if agreement could be reached among the various options regarding prohibition, the issue of "appropriate" regulation is equally divisive. Thus, there are fundamental disagreements on basic regulatory issues — such as determinations of parentage, whether to conduct best interests determinations, regulation of the financial aspects of surrogacy, the status of "surrogate mothers" and even the terminology, implementation of the rights of identity and access to origins, suitability reviews of intending parents, the significance of genetic connections, and the role of contracts and the courts. Thus, even those who argue for legalizing and regulating surrogacy may completely disagree about the appropriate forms of regulation.[40]

22. Amidst this controversy, the present study identifies a safe harbour, in a simple premise: all States are obligated to prohibit, and to create safeguards to prevent, the sale of children. While the imperative to prohibit and prevent the sale of children does not provide answers to all policy debates over surrogacy, it does narrow the scope of permissible approaches.

23. This focus on the prohibition of sale of children responds to the risk that States and the international community would attempt to legalize and normalize the sale of children and other human rights violations when regulating surrogacy. Amidst the demand for governing law, the demand for children, and the influence of a wealthy and growing surrogacy industry, there is a risk that the governing law that is adopted will undermine fundamental human rights. The demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights.[41]

24. Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through recognition principles, it would undermine established human rights norms and standards.

25. The international community cannot relinquish gains made in the development of child rights norms and standards, including those developed in the context of adoption. In prior decades, the international community confronted adoption systems which were based on satisfying adult demands for children and were driven by commercial interests and

[38] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 18; see also Judge Pascoe 2014 as per footnote 22 above.

[39] See "An update on the work of the Hague Conference", pp. 102–103 and footnotes 32–33.

[40] See HCCH — "A preliminary report on the issues arising from international surrogacy arrangements" and "A study of legal parentage and the issues arising from international surrogacy arrangements"; cf. American Bar Association report (see below).

[41] Cf. American Bar Association, report and resolution 112B, available at https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf.

financial incentives, and which in practice exploited the vulnerability of birth parents.[42] In response, the international community has insisted that the best interests of the child be the "paramount consideration" in regard to adoption,[43] created standards requiring strict regulation of the financial aspects of intercountry adoption,[44] sought to protect vulnerable birth families, and denied that prospective adoptive parents have a right to a child.[45] Implementation of these norms in relation to adoption has been difficult, but significant progress has been made in terms of standard-setting, monitoring and compliance.[46]

26. Yet, the commercial surrogacy industry and its advocates have insisted that the kinds of systems rejected by the international community in regard to adoption be accepted in regard to surrogacy systems. Hence, the commercial surrogacy industry and its advocates insist that commercial surrogacy be accepted worldwide as a market-based system designed to respond primarily to adult demands for children, whereby parentage is determined primarily by contract. For example, the American Bar Association, which represents over 400,000 attorneys,[47] advocates for commercial surrogacy nationally and internationally.[48] The stance of the American Bar Association is of international significance because it advocates for commercial international surrogacy arrangements and for intermediaries who practise globally.

27. The American Bar Association notes that "it is undeniable that the commissioning of children through surrogacy — for money — represents a market".[49] The American Bar Association praises this "market", noting that "market-based mechanisms have allowed international surrogacy to operate efficiently".[50] The American Bar Association rejects application of the best interests of the child standard to surrogacy,[51] rejects most forms of suitability review and evaluation of parental fitness of intending parents,[52] rejects caps for compensation for surrogate mothers and gamete donors,[53] rejects licensing requirements for surrogacy agencies,[54] rejects rights to birth records or origins information,[55] rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a "model for a surrogacy convention",[56] and rejects bilateral treaties on surrogacy.[57] The American Bar Association states that "any focus on regulating the international surrogacy market itself is misguided".[58] Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns;[59] hence, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations".[60] If this position is endorsed, the gains in developing child rights norms

[42] See, for example, Saclier, "Children and adoption", pp. 12–13; and van Loon, "Report on intercountry adoption".

[43] See the Convention on the Rights of the Child, art. 21.

[44] Ibid., art. 21 (d); 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, "Note on the financial aspects of intercountry adoption (2014), available from https://www.hcch.net/en/publications-and-studies/details4/?pid=6310.

[45] See the 1993 Hague Convention, art. 4; and Saclier, "Children and adoption", pp. 12–13.

[46] See the Convention on the Rights of the Child, arts. 20–21; the 1993 Hague Convention; and A/HRC/34/55.

[47] See https://www.americanbar.org/about_the_aba.html.

[48] See American Bar Association report and resolution. It should be noted that the Association does not represent the Government of the United States and that there are both permissive and prohibitionist jurisdictions in the United States. See Joslin, footnote 7.

[49] American Bar Association report, p. 9.

[50] Ibid., p. 11.

[51] Ibid., pp. 15–16.

[52] Ibid., pp. 4, 17–18.

[53] Ibid., pp. 20–21.

[54] Ibid., p. 20.

[55] Ibid., pp. 21–22.

[56] Ibid., p. 15.

[57] Ibid., pp. 4–5.

[58] Ibid., p. 14.

[59] Ibid., p. 1.

[60] Ibid., p. 7.

and standards in relation to adoption will be erased, and a new generation of human rights violations will emerge.

28. There are significant differences between adoption and surrogacy, and not all rules applicable to adoption apply to surrogacy. Nonetheless, certain human rights principles are applicable to both, including the prohibition of the sale of children,[61] the best interests of the child as a paramount consideration,[62] the lack of a right to a child,[63] strict regulations and limitations regarding financial transactions,[64] rights to identity and access to origins,[65] and protections against exploitation.[66] The present report focuses on the necessity of maintaining these human rights standards against the pressures created by the large-scale practice of a market- and contract-based form of commercial surrogacy.

C. Abusive practices in surrogacy systems

29. Abusive practices in the context of surrogacy are well documented. Examples include convicted sex offenders from Australia and Israel employing surrogate mothers from India and Thailand,[67] a wealthy Japanese man employing 11 surrogate mothers, leading to the births of 16 infants in Thailand and India,[68] the abandonment of a surrogacy-born infant with disability in Thailand,[69] and the abandonment or sale of "excess" surrogate-born infants in twin births in India.[70] Commercial surrogacy networks transfer surrogate mothers, sometimes while pregnant, across national borders in order to evade domestic laws; in one case, 15 Vietnamese women were found and freed by Thai authorities, leading to human trafficking charges in the context of a baby-farming scheme.[71]

30. Many of these abuses occur in unregulated contexts, often in cases involving intending parents from Western countries employing for-profit intermediaries to contract with vulnerable surrogate mothers in developing countries.[72] However, abusive practices also occur in purportedly well-regulated commercial surrogacy jurisdictions. For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements.[73] According to governmental authorities, a prominent surrogacy attorney admitted that "she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over $100,000

[61] See the Convention on the Rights of the Child, art. 35; and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

[62] See the Convention on the Rights of the Child, arts. 3 and 21.

[63] Saclier, "Children and adoption", pp. 12–13; and Van Bueren, *The International Law on the Rights of the Child* (1995).

[64] See the Convention on the Rights of the Child, art. 21 (d); the 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, "Note on the financial aspects of intercountry adoption".

[65] See the Convention on the Rights of the Child, arts. 7, 8 and 9.

[66] Ibid., art. 35; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and the Trafficking in Persons Protocol, of 2000.

[67] See, for example, www.geneticsandsociety.org/article.php?id=6933; www.abc.net.au/news/2014-08-06/baby-gammys-father-convicted-on-more-than-20-child-sex-charges/5653502; and [2016] FCWA 17, available at www.familycourt.wa.gov.au/_files/Publications/2016FCWA17anon.pdf.

[68] See Samantha Hawley, Japanese man fathers 16th baby via surrogate in Thailand, 9 September 2014, at www.abc.net.au/news/2014-09-10/japanese-surrogacy-man-has-another-baby/5732856.

[69] See [2016] FCWA 17 as per footnote 67 above.

[70] See, for example, www.bionews.org.uk/page_460525.asp and http://nymag.com/thecut/2015/03/dark-side-of-international-surrogacy.html.

[71] See https://www.pri.org/stories/2011-03-18/underworld-upending-asian-baby-farm and www.scmp.com/week-asia/society/article/2096675/how-asias-surrogate-mothers-became-cross-border-business.

[72] See sources cited in footnotes 67–71 above.

[73] Smolin, "Surrogacy as sale of children", pp. 328–330.

each".[74] The convicted attorney told the local media that, as to abusive practices, she was the "tip of the iceberg" of a "corrupt" "billion-dollar industry".[75]

31. Another case from California, *Cook v. Harding*,[76] reveals the intentional regulatory omissions in a regulated commercial surrogacy jurisdiction: "The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the foetuses) or who may solicit the services of a gestational carrier … No minimum levels of income, intelligence, age or ability are required for either the surrogate or the intended parent(s)."[77]

32. In Cook, the surrogacy agency matched a 47-year-old surrogate mother with a 50-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father balked at paying the costs of the high-risk triplet pregnancy, and also demanded a reduction abortion. The surrogacy contract contained a common provision that reduction abortion decisions would be made by the intending parent. The surrogate mother refused the reduction abortion.[78] Hence, "C.M.'s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder".[79] It is also argued that surrogate mothers who refuse to submit to reduction abortions are liable for monetary damages, including "the cost of medical treatment (for) … a resulting child."[80]

33. Hence, surrogacy regulations in some jurisdictions are designed to enforce contracts, obtain children for intending parents, maintain the industry's profits, and intentionally reject most protections for children or surrogate mothers. These kinds of contract-based models lead to systemic abusive practices. Indeed, these contract-based legal regimes lead to the sale of children, as they include the kinds of pre-birth contractual determinations of parentage that the Committee on the Rights of the Child has warned can lead to the sale of children.[81]

D. International legal framework

34. It is stated in article 35 of the Convention on the Rights of the Child that: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." The phrase "for any purpose or in any form" is significant, and surrogacy is no exception to the article's prohibitions. Family formation should not be accomplished through "the abduction of, the sale of or traffic in children".

35. The prohibition of sale of children is clearly stated in article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Article 2 (a) of that Optional Protocol defines sale of children as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration". The premise of the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is that the sale of children is a serious

[74] Federal Bureau of Investigation, "Baby-selling ring busted". Available at https://archives.fbi.gov/archives/sandiego/press-releases/2011/baby-selling-ring-busted.

[75] Rory Devine and R. Stickney, "Convicted surrogacy attorney". Available at www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html.

[76] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order.

[77] Ibid., p. 6.

[78] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order; and Dov Fox, "Surrogacy contracts, abortion conditions, and parenting licenses", available at http://blogs.harvard.edu/billofhealth/2016/06/07/surrogacy-contracts-abortion-conditions-and-parenting-licenses-in-the-curious-case-of-cook-v-harding/.

[79] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order, p. 8.

[80] Dov Fox, "Surrogacy contracts, abortion conditions, and parenting licenses".

[81] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

harm and human rights violation in and of itself, without having to prove any other rights violation under the Convention such as sexual or labour exploitation.[82]

36. The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, confirms that the prohibitions of article 35 of the Convention on the Rights of the Child and article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography apply to methods of family formation (such as intercountry adoption), stating in its article 1: "The objects of the present Convention are ... to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."

37. The Convention on the Rights of the Child assumes a permissible diversity of State policies on both domestic and intercountry adoption. Hence, some States view both domestic and intercountry adoption as positive methods of family formation, while other States do not provide in their national law for one or both.[83] The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, makes it clear that regardless of those policy differences, States must create safeguards to prevent the abduction of, the sale of or traffic in children from being used as a means of family formation. This principle also applies to surrogacy. In that respect, the Committee on the Rights of the Child has been consistent in its review of States that are affected by surrogacy, stating that if not properly regulated, surrogacy can constitute sale of children.[84] Thus, States, regardless of their perspectives on surrogacy, must prohibit, and create safeguards to prevent, the abduction of, the sale of or traffic in children in the context of surrogacy.

E. Defining commercial surrogacy

38. One definition of commercial surrogacy, also known as "for-profit" or "compensated" surrogacy, focuses on the contractual and transactional — rather than gratuitous — relationship between the intending parent(s) and the surrogate mother. Hence, commercial surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration.

39. Commercial surrogacy also includes "reimbursement" that goes beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement.[85] The inference is that payments for unreasonable or non-itemized "expenses" are disguised payment for gestational services and/or transfer of the child.

40. The involvement of for-profit intermediaries is another indication of commercial surrogacy. For the purpose of the present report, intermediaries are defined as parties (persons or organizations/institutions) that bring together intending parents and surrogate mothers, and/or mediate the ongoing surrogacy arrangement — including medical clinics, medical professionals, attorneys, surrogacy agencies or "brokers". Medical professionals or clinics, and attorneys, receiving reasonable compensation for the professional services necessary to surrogacy, are not necessarily intermediaries, if they do not perform these functions of establishing and mediating the relationship between the intending parents and the surrogate mother. This supplementary definition of commercial surrogacy is necessary because intermediaries often receive the largest profits and create large-scale national and transnational surrogacy markets and networks.

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[82] John W. Tobin, "To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?" *International and Comparative Law Quarterly*, vol. 63, No. 2 (2014), University of Melbourne Legal Studies research paper No. 689, pp. 18–21 and 24–27, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476751.

[83] See 1993 Hague Convention, art. 21; and *Child Adoption: Trends and Policies*, United Nations publication, available at www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

[84] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[85] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements".

F. Surrogacy and sale of children

41. Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law. As will be described in section IV below, commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards, and in a manner contrary to what exists in many commercial surrogacy regimes. Altruistic surrogacy, too, must be appropriately regulated to avoid the sale of children (see section III (G) (8) below).

42. Under article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, surrogacy arrangements constitute sale of children whenever the surrogate mother or a third party receives "remuneration or any other consideration" in exchange for transferring the child. There are three elements in the definition of sale of children: (a) "remuneration or any other consideration" (payment); (b) transfer of a child (transfer); and (c) the exchange of "(a)" for "(b)" (payment for transfer).

1. First element: remuneration or any other consideration (payment)

43. The receipt or promise of "remuneration or any other consideration" (payment) occurs by definition in all commercial surrogacy arrangements. A promise of future payment would constitute "other consideration", and hence the element is established even before payments are made. The question of payment in altruistic surrogacy is addressed in section III (G) (8) below.

2. Second element: the transfer of a child (transfer)

44. Transferring a child entails either a legal transfer of the child or physically transferring the child. Legal transfer of the child would include transfer of parentage or parental responsibility.[86] Physical transfer of the child would include the act of one person or group of persons physically turning a child over to another person or group of persons. Physical transfer of the child does not require a legal transfer. The concept of sale of children does not require the transferor to have parentage or legal parental responsibility. A trafficker illicitly sells a child by physically transferring a child in exchange for "remuneration or any other consideration", even though his or her control of the child is illegal.

45. Legal transfer of a child occurs or is promised in surrogacy arrangements. Women who give birth are generally accorded parentage and parental responsibility at birth under the national law of all States. Indeed, this is a requirement under the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, even in instances where an intercountry adoption is planned.[87] The surrogate mother's status as a parent at birth is generally recognized in traditional surrogacy arrangements, as the surrogate mother is both the genetic and the gestational mother. Hence, a transfer is necessary for the intending parents to attain parentage.

46. The situation is more complicated as regards gestational surrogacy. Since there is no jurisdiction which generally requires women who give birth to prove a genetic connection to establish parentage, the lack of a genetic connection is not an obstacle to parentage. Indeed, surrogacy advocates do not consider a lack of genetic connection to be a barrier to intending parents establishing parentage, and some surrogacy regimes do not require even one intending parent to be genetically related.[88]

47. Nonetheless, some surrogacy jurisdictions have created legal rules by which gestational surrogate mothers, often relabelled "gestational carriers", "surrogate carriers" or "gestational surrogates", lose parentage prior to birth, based upon a contract made prior to

[86] The term "parental responsibility" is based on the Convention on the Rights of the Child (art. 18), and includes the term "custody" used in some jurisdictions.

[87] See the 1993 Hague Convention, art. 4 (c) (4).

[88] See the American Bar Association report; and the California Family Code, sects. 7960–7962.

embryo transfer.[89] Under such laws, a valid surrogacy contract effectuates the transfer of the child either by operation of law, or else by pre- or post-birth action by a court or other competent authority, with the court or competent authority obligated to effectuate the transfer so long as the contract itself meets certain minimum standards.[90] Hence, it is the surrogacy contract, rather than merely being genetically unrelated, that for these surrogacy jurisdictions renders the surrogate mother an unrelated "gestational carrier".[91] Under those circumstances, the surrogacy contract itself includes a legal transfer of parentage, or at least a pivotal and irreversible step toward such. The surrogate mother, in signing a surrogacy contract, is participating in a legal transfer of the child. Thus, in *Johnson v. Calvert*, the Supreme Court of California specifically referred to the surrogate mother "contracting away any rights to the child".[92]

48. In addition, surrogacy contracts, explicitly or implicitly, include an undertaking by the surrogate mother to cooperate with legal proceedings which ensure that she and her spouse (if applicable) terminate parentage and parental responsibility, and that parentage and parental responsibility legally reside with the intending parents.[93] In some jurisdictions, the transfer is done prior to the birth, based on the actions of courts or other competent authorities approving the surrogacy arrangement.[94] Once again, the surrogate mother's pre-birth actions facilitate the vesting of parentage in the intending parents. Therefore, surrogacy arrangements typically include a promised or actual legal transfer of a child. Legal systems which accomplish the transfer prior to birth do not alter the existence of a legal transfer.

49. Surrogacy arrangements also include a promised or actual physical transfer of the child from the surrogate mother to the intending parent(s). Indeed, some surrogacy contracts seek to contractually or physically restrict the surrogate mother's freedom of movement in order to ensure control by the intending parent(s) over the child at birth.[95] Explicitly or implicitly, the surrogate mother is promising in surrogacy arrangements to physically transfer the resulting child to the intending parent(s).

3. Third element: the exchange (payment for transfer)

50. The third and final required element in sale of children is the term "for", which refers to an exchange: the "remuneration or any other consideration" (payment) must be made "for" the transfer of the child.

51. Commercial surrogacy arrangements typically include this element of an exchange between the payment and the transfer. In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised. If a surrogate mother underwent becoming pregnant, pregnancy, and giving birth, she would not be deemed to have fulfilled her promises and contractual obligations if she refused to participate in the legal and physical transfer of the child to the intending parent(s). While the surrogate mother is paid, in commercial or compensated surrogacy arrangements, for the services of gestating and giving birth to a child, she is also being paid for the transfer of the child. Commercial surrogacy legislation and practice which mandate the enforcement of the surrogacy contract, including specifically the transfer of parentage and parental responsibility,[96] make it even clearer that the transfer is of the essence of the contract and is a part of the consideration for which the surrogate mother is paid. Thus, under current practice, the third element of an exchange is met in most commercial surrogacy arrangements.

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[89] See Joslin, pp. 3–6 (in the United States: California, Maine and New Hampshire).
[90] Ibid.
[91] Ibid.
[92] 851 P.2d (1993), p. 776 and pp. 781–782.
[93] Ibid., p. 778.
[94] See Joslin.
[95] Deborah Forman, "Abortion clauses in surrogacy contracts", *Family Law Quarterly*, vol. 49 (2015), p. 29; and see https://www.pri.org/stories/2011-03-18/underworld-upending-asian-baby-farm.
[96] See Joslin, pp. 3–4.

G. Sale of children in particular contexts

1. Sale of children and time of contracting

52. In California, commercial surrogacy contracts created during pregnancy are viewed as sale of children, but commercial surrogacy contracts signed before embryo transfer are not.[97]

53. If the distinction is based on the theory that a human being who does not exist, or over whom there is not yet custody, cannot be sold, under such a theory babies could legally be sold for adoption so long as the contract or relinquishment was signed before the pregnancy, leading to legalization of baby-farming schemes. In the commercial world, pre-production orders of goods are common; carrying such practices into the procurement of human beings is in clear breach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Indeed, in a renowned surrogacy case, the creation of the surrogacy contract prior to conception was viewed as indicating a violation of a local law prohibition of the sale of children.[98]

2. Sale of children and parentage at birth

54. In some jurisdictions, the law defines a genetically unrelated surrogate mother as a mere "gestational carrier". If a valid pre-embryo transfer contract is entered into, the law regards the "gestational carrier" as not being the mother of the child at birth. Pre-birth procedures are implemented such that the contractual intending parent(s) are listed as the only parent(s) on the original birth document, regardless of whether or not the intending parent(s) are genetically related to the child. Proponents of this kind of approach contend that no sale of children occurs in this legal context, even where commercial surrogacy is concerned, because the "gestational carrier" cannot transfer a child that has never been hers.[99] The prior claim, analysed in section III (G) (1) above, that the time of contracting avoids the prohibition of sale of children, is often used in tandem with this argument.

55. This perspective relies on the controversial premise that a woman who gestates and gives birth to a child is no more of a mother than a childcare worker is.[100] Such perspectives also rely on the claim that the gestational surrogate mother is never a mother because she is genetically unrelated, which is contradictory to the practice of providing parentage to genetically unrelated intending parents.[101]

56. However, even if one were to accept such controversial premises and inconsistencies, in some commercial surrogacy jurisdictions it is the surrogacy contract that is primarily determinative as to parentage.[102] Hence, the gestational surrogacy contract explicitly and implicitly includes a transfer of parentage, and that transfer is usually a central part of the legal consideration for which the gestational surrogate is paid. Furthermore, the surrogate mother is also paid to give birth in a place accessible to the intending parents, and to physically hand over the child after birth; as stated above, under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography a transfer can exist even if the transferor lacks parentage or parental responsibility.

57. The legal fiction of the "never-a-mother" gestational carrier is a legal concept which is used to justify denial of the surrogate mother's rights. Once the surrogate mother is reduced, during pregnancy, to a never-a-mother gestational carrier acting for the benefit of intending parents, the door is open to enforcing contracts that purport to alienate her rights and freedoms (e.g. the right to health and the right to freedom of movement).[103]

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[97] See footnotes 74–76 above.

[98] *Baby M.*, 537 A.2d, p. 1227 (pinpoint: p. 1240) (Supreme Court of New Jersey, 1988).

[99] See Joslin; and Smolin, pp. 311–315.

[100] Steven Snyder, "Reproductive surrogacy in the United States of America", *Handbook of Gestational Surrogacy* (2016), pp. 276–278.

[101] American Bar Association report, pp. 1, 5, 15 and 17.

[102] See Joslin; and *Johnson v. Calvert*.

[103] See Joslin; and *New Hampshire Revised Statutes Annotated*, sects. 168-B:10, B:11 and B:12 (2014).

3. Sale of children and exclusive parentage

58. Some claim that intending parents cannot buy "their own" children. However, intending parent(s) at a minimum are paying for exclusivity, so that they will not have to share parentage and parental responsibility with the surrogate mother. In order to achieve this exclusivity, intending parent(s) pay the surrogate mother to release and transfer legal parentage and parental responsibility, as well as to physically transfer the child.

59. The premise that the child is automatically the child of the intending parent(s) is also flawed. It is often the contract or the arrangement that is the basis for parentage in commercial surrogacy jurisdictions, and the contract explicitly or implicitly includes a transfer, as noted in section III (F) above.

4. Sale of children and the sale of services

60. Some argue that commercial surrogacy is merely the sale of gestational "services" and not the sale of children. Even though commercial surrogacy includes the sale of gestational services, as the surrogate mother agrees to undergo artificial insemination or embryo transfer, to gestate and to give birth to the child, commercial surrogacy as it is usually practised also includes payment for the legal and physical transfer of the child. In general, the provisions relating to the transfer of the child are of the essence of the agreement, without which the intending parents would neither enter into the agreement nor pay the surrogate mother. Hence, although commercial surrogacy includes the sale of services, it also usually includes the sale of the child.

61. Some try to evade the prohibition on sale of children by inserting into surrogacy agreements a provision stating, in substance, that the parties agree that all payments are for services and none are for the transfer or sale of the child. However, the prohibition on sale of children cannot be avoided by contracts arbitrarily relabelling the sale of children as something else, when in substance the arrangement includes the sale of children.

5. Sale of children and intermediaries

62. Intermediaries are often responsible for creating and participating in surrogacy markets, and often receive the largest profits. Where the interactions between the intending parent(s) and the surrogate mother constitute sale of children, intermediaries would normally be complicit, and hence legally responsible, given their intermediary role in establishing and mediating the relationship between the intending parent(s) and the surrogate mother. Prosecutions for sale of children in the context of surrogacy should focus primarily on intermediaries, and, absent exceptional circumstances, they should not include surrogate mothers, who may often be regarded as exploited victims.

63. Intermediaries who physically or legally transfer the child to intending parents in exchange for "remuneration or any other consideration" are directly liable for the sale of the child. Some intermediaries exercise extraordinary physical or legal control over the surrogate mother, and exercise direct control over the surrogate-born child. In such instances, the intermediary may be primarily responsible for the transfer of the child, and thus may be directly liable in appropriate cases for the sale of the child.

6. Sale of children and the rejection of a "right to a child"

64. International and regional human rights instruments protect the right to "found a family" or the right to "respect for ... private and family life."[104] The language of a "right to procreate" is used in some national legal systems, though this terminology is not found in international human rights instruments. On bases such as these, it is sometimes argued that all adults are entitled to create a family and raise children. However, it is recognized that there is no "right to a child" under international law.[105] A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing

[104] See, for example, the International Covenant on Civil and Political Rights, art. 23 (2); the European Convention on Human Rights, art. 8; and the American Convention on Human Rights, art. 17 (2).

[105] See, for example, Saclier, "Children and adoption", pp. 12–13; and Van Bueren, *The International Law on the Rights of the Child*.

a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.

65. In general, advocates for commercial surrogacy are not asking the State to grant them "privacy" in the sense of leaving them alone to conduct their private and family life without State interference. On the contrary, commercial surrogacy advocates seek to enlist the State in enforcing surrogacy contracts in ways that strip children of rights to best interests protections, and rights to identity and access to origins, while simultaneously stripping surrogate mothers of parentage status and autonomy over health-care decisions. Commercial surrogacy advocates seek and sometimes obtain legislation that empowers intermediaries and intending parents at the expense of children and surrogate mothers.[106] Furthermore, the complex networks of contracts and highly paid intermediaries and the financial transactions typically involved in commercial surrogacy arrangements are not the sorts of matters viewed as immune from regulation.

7. Sale of children and the role of regulation

66. Some may agree that unregulated surrogacy can lead to the sale of children, but argue that well-regulated commercial surrogacy systems will not. Similarly, some may suggest that purportedly well-regulated commercial surrogacy systems in developed countries avoid the sale of children, even if international commercial surrogacy systems operating in developing countries often do not.[107]

67. It is accurate that unregulated commercial surrogacy systems often involve the sale of children, and are subject to abusive practices and rights violations. Thus, the Committee on the Rights of the Child has specifically warned that surrogacy, "if not clearly regulated, amounts to sale of children".[108]

68. However, it is not accurate that regulated commercial surrogacy systems avoid the sale of children. Thus, in 2017, the Committee on the Rights of the Child stated, in regard to the United States, that it was "nevertheless concerned that widespread commercial use of surrogacy in the State party may lead … to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage."[109] The Committee's concern is directly applicable to regulated commercial surrogacy jurisdictions in the United States, which generally have enacted legislation making commercial surrogacy contracts enforceable and determinative as to parentage.[110]

8. Sale of children and altruistic surrogacy

69. In theory, a truly "altruistic" surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries. Hence, in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. Therefore, labelling surrogacy arrangements or surrogacy systems as "altruistic" does not automatically avoid the reach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and it is necessary to appropriately regulate altruistic surrogacy to avoid the sale of children. Courts or other competent authorities must require all "reimbursements" to surrogate mothers to be reasonable and itemized, as otherwise "reimbursements" may be disguised payments for transfer of the child. Payments

[106] See footnotes 47–60 and 75–80 above.

[107] See, for example, Snyder, p. 284.

[108] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[109] Ibid.

[110] See Joslin.

to intermediaries, whether for-profit or not-for-profit, may be considered an indication of commercial surrogacy, and should be reasonable and itemized. There is particular risk when significant reimbursements or payments are made using open-ended categories such as "pain and suffering" or "professional services".

9. Sale of children and recognition of foreign surrogacies

70. States that prohibit all surrogacies, or commercial surrogacies, often face a situation where their nationals evade their laws by conducting a surrogacy abroad and then seek to bring the child home. Cross-border surrogacies are mostly commercial surrogacies mediated by for-profit intermediaries, and are usually conducted in jurisdictions that permit commercial surrogacy. The State of the intending parents should not assume that such surrogacies are altruistic. Given the risk of sale of children in both regulated and unregulated commercial surrogacies, States generally should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad. The State of the intending parents is responsible for conducting post-birth best interests determinations, protecting the child's identity rights and access to origins, and making independent assessments as to parentage, and also for inquiring into the treatment and post-birth consent of the surrogate mother. The State of the intending parents should only grant parentage and parental responsibility to intending parents after such evaluations, based on the best interests of the child. The child must not be punished or discriminated against due to the circumstances of his or her birth, and the rights of surrogate-born children must be protected.[111] The States concerned, namely the State(s) of the intending parents and the State in which the child is born, are responsible for ensuring that statelessness does not occur.

10. Sale of children and post-birth relinquishments

71. The requirement that the surrogate mother have non-exclusive parentage and parental responsibility at birth is necessitated by the norm against sale of children, and protects the rights of the surrogate mother. Nonetheless, where the surrogate mother, after the birth, does not wish to retain parentage or parental responsibility, the best interests of the child require that there be a legal mechanism for transfer of the child. All States are responsible for establishing such a mechanism in surrogacy arrangements, for the post-birth transfer of the child, even if they otherwise do not permit parents to relinquish children or transfer parentage.

IV. Conclusions and recommendations

A. Conclusions

72. **Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract. If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement. Any choice by the surrogate mother after the birth to legally and**

[111] See the cases cited in footnote 32 above.

physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation.

73. A properly regulated system of commercial surrogacy would also provide necessary protections for children, including post-birth individualized best interests of the child determinations, appropriate suitability reviews of intending parents, and protections of rights of origin and access to identity. For the protection of all parties, it is appropriate to conduct screenings and reviews of surrogacy arrangements prior to pregnancy, but pre-birth processes cannot be conclusive as to parentage and parental responsibility, which can only be determined upon appropriate review after the birth. Similarly, appropriate protections of surrogate mothers, consistent with retaining the status of mother at birth, would include retention of rights of informed consent in regard to all health-care decisions, and freedom of movement and travel — including the principle that such rights cannot be alienated by contract. Appropriate regulation of the financial and medical aspects of surrogacy, and strict regulation of intermediaries, would also be necessary.

74. Commercial surrogacy is currently practised in jurisdictions where even genetically unrelated surrogate mothers retain parentage at birth (e.g. the Russian Federation).[112] In addition, surrogacy practitioners claim that in some jurisdictions lacking surrogacy laws they practise commercial surrogacy relying on pre-existing rules related to parentage, termination of parental rights, and adoption, resulting in post-birth voluntary transfers by the surrogate mother to the intending parent(s) and post-birth parentage orders.[113] In addition, commercial surrogacy advocates claim that relatively few surrogate mothers change their mind and seek to retain parentage and parental responsibility after birth, making the risks to intending parents of surrogate mothers retaining parentage at birth rather limited. Indeed, a prominent commercial surrogacy attorney found that intending parents changed their minds significantly more often than surrogate mothers.[114] Thus, current practice indicates that commercial surrogacy can be practised under legal regimes that retain the traditional rule that the woman who gives birth is the mother at birth, and which implement appropriate post-birth procedures for transfer. Certainly, practising commercial surrogacy in unregulated environments remains highly risky and is not recommended.

75. In order to fulfil their obligation to prohibit, and create safeguards to prevent, the sale of children in the context of surrogacy, States should prohibit commercial surrogacy until and unless a proper regulatory system, which includes a clear and comprehensive legal framework, is put in place as described above. Such an approach responds to the premise that the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother. It is possible for States to strictly regulate and permit commercial surrogacy without involvement in the sale of children, if they clearly enact, and enforce effectively, regulations as indicated in the present conclusions and recommendations. States should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and accompanying pre-birth parentage orders, for such would make the States complicit in authorizing practices that constitute the sale of children.

76. Similarly, as regards altruistic surrogacy, where permitted, States should appropriately regulate the practice to prevent the sale of children and respect the international prohibition in that regard, for example by requiring that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to review by courts or other competent authorities.

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[112] See Trimmings and Beaumont, pp. 313–319; and European Parliament, "A comparative study on the regime of surrogacy in EU member States", pp. 333–338.

[113] See Trimmings and Beaumont, pp. 391–392.

[114] See https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html.

B. Recommendations

1. At the national level

77. **The Special Rapporteur invites all States to:**

(a) **Ratify the Convention on the Rights of the Child and its three Optional Protocols;**

(b) **Adopt clear and comprehensive legislation that prohibits the sale of children, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in the context of surrogacy;**

(c) **Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;**

(d) **Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);**

(e) **Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration;**

(f) **Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority conducts an appropriate and non-discriminatory suitability review of the intending parent(s), either prior to or after the birth or both;**

(g) **Closely regulate, monitor and limit the financial aspects of all surrogacy arrangements, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;**

(h) **Regulate all intermediaries involved in surrogacy arrangements, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;**

(i) **Regulate the medical aspects of surrogacy arrangements to ensure the health and safety of the surrogate mother and child, including by placing appropriate limits on the number of embryos transferred to a woman at one time;**

(j) **Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;**

(k) **Focus any criminal or civil penalties for illegal surrogacy arrangements primarily upon the intermediaries;**

(l) **Collect, analyse and share comprehensive and reliable data, and conduct qualitative and quantitative research studies, on surrogacy arrangements and their impact on human rights, to ensure that accurate information is available, and facilitate**

the monitoring and evaluation of surrogacy systems, services and outcomes in order to develop appropriate human rights-compliant measures.

2. At the international level

78. **The Special Rapporteur invites the international community to:**

(a) **Support the work of the Hague Conference on Private International Law, in particular in relation to its study of private international law issues related to the legal parentage of children, including in the context of international surrogacy arrangements;**

(b) **Ensure that any international regulation developed in regard to surrogacy, or in regard to legal recognition of parentage in international surrogacy arrangements, focuses on both private international law and public international law, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no "right to a child" in international law;**

(c) **Ensure that any international regulation addressing recognition of parentage in international surrogacy arrangements, or addressing recognition of foreign judicial decisions on parentage, or other foreign determinations on parentage, also includes appropriate public policy exceptions barring recognition where the foreign legal system does not adequately protect the rights of the child or the surrogate mother, and provide appropriate post-birth review in cross-border commercial surrogacies in order to prevent the sale of children;**

(d) **Support the work of the International Social Service in developing international principles and standards governing surrogacy arrangements that are in accordance with human rights norms and standards and particularly with the rights of the child;**

(e) **Work cooperatively to ensure the protection of the rights of surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, which should include protection of the best interests of the child and prevention of statelessness;**

(f) **Encourage other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities to contribute, with further research, to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.**

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the right to food

Note by the Secretariat

The report focuses on the right to food in the context of natural disasters, and follows the interim report devoted to the humanitarian system and the right to food in conflict situations (A/72/188). Based on country-specific examples, the report contextualizes direct and indirect impacts of natural disasters on the right to food and people's livelihoods. The Special Rapporteur then discusses how disasters contribute to hunger and what should be done to reduce human rights violations and damage to the environment. The report also underlines the importance of achieving a convergence between emergency food aid, food assistance and development cooperation, to ensure the realization of the right to food. Finally, she argues that in order to achieve these goals, the common understanding whereby voluntarism is seen as central to humanitarian response efforts needs to change.

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I. Introduction

1. The 2017 report entitled *The State of Food Security and Nutrition in the World*, of the Food and Agriculture Organization of the United Nations (FAO), declares that currently 815 million people (11 per cent of the global population) are affected by hunger, an increase from 777 million in 2015. This represents a drastic increase after a prolonged decline. Hunger kills more people every year than malaria, tuberculosis and AIDS combined. At this rate, it might be difficult to reach Sustainable Development Goal 2, which is aimed at achieving a world without hunger and malnutrition by 2030.

2. The main causes reversing the progress towards eliminating hunger are armed conflicts, natural disasters and climate change-induced extreme weather events, economic slowdown, and failure of effective social protection and poverty elimination policies. Often, all of the above reasons reinforce each other, creating severe food insecurity despite global cereal production and stocks being at historic highs.

3. Global warming triggers or prolongs natural disasters, causing significant effects on food security. In 2015 and 2016, drought caused by one of the harshest El Niño events on record led to significant crop and livestock losses in sub-Saharan Africa, affecting the livelihoods of farmers and agricultural communities; consecutive failed harvest seasons resulted in wide-scale dependence on food aid, high rates of debt and massive depletion of household seed supplies. African countries are particularly vulnerable to climate impacts on agriculture, since less than 5 per cent of the continent's cropped area is irrigated.

4. Severe floods in 2017 continued to affect at least 8 million people, causing deaths and injuries, loss of livestock and food supplies, and damage to housing and farming infrastructure. Besides destroying food supplies and sources, such disasters also impact the food production system as a whole, affecting food prices, and have important consequences on communities' livelihoods. Such situations are likely to continue to affect a large number of people, given that 80 per cent of hungry people currently live in disaster-prone and environmentally degraded areas.[1]

5. Although the immediate obligation to provide food, water, shelter and medical aid is the duty of governments, in times of emergency the international community has the responsibility to help countries in dire situations. It is clearly asserted in general comment No. 12 (1999) on the right to adequate food, of the Committee on Economic, Social and Cultural Rights, that States are obliged to provide disaster relief and humanitarian assistance in times of emergency. These responsibilities are universal, normative and ethical, and are also essential to sustainable world peace, which can only be achievable when hunger and malnutrition are eliminated.

6. In recent decades, the international humanitarian response system has been essential in reducing the negative effects of conflict and natural disasters on food security and in lowering death tolls. While it is larger than ever in terms of financial and human resources, concurrent major emergencies have overstretched its humanitarian operational capacity and ability to meet global demands.

7. According to FAO, worldwide economic losses from natural disasters have reached a staggering average of $250 billion to $300 billion a year. Yet, we know comparatively little about the full impact of such disasters on the agricultural sectors.

8. The World Food Programme (WFP) estimates that food aid expenditures more than doubled between 2009 and 2016, from $2.2 billion to $5.3 billion. Even though international food assistance has risen in response to escalating humanitarian crises, it still falls about $3 billion short. Almost all foreign aid for food security goes to short-term relief operations just to keep people alive, therefore there are no available funds devoted to agricultural investment and rural development, which could raise the quality of food

[1] See https://www.wfp.org/content/how-disasters-drive-hunger.

security and build resilience in regions vulnerable to climate change and conflict crises.[2] According to the World Bank, natural disasters push 26 million people into poverty each year, eroding development gains and increasing dependency on aid.[3]

9. Although encouraging pledges were made at the World Humanitarian Summit in 2016 to address shortcomings of humanitarian assistance, due to the recent increase in the number of such disasters and conflicts, the humanitarian emergency system has been experiencing difficulties, including a dire funding gap, and challenges in terms of leadership, coordination, functionality and efficiency. However, it is important to underline that regarding food assistance in particular, efforts have been made in recent decades to deliver more context-specific food aid, to increase local participation and avoid dependency or the disruption of local food systems, and to implement a human rights-based approach to disaster relief efforts.

10. Following the Special Rapporteur's interim report devoted to the humanitarian system and the right to food in conflict situations (A/72/188), the present report focuses on the right to food in the context of natural disasters. Based on country-specific examples of extreme weather events, such as droughts, desertification and floods, as well as sudden disasters such as hurricanes, wildfires, tsunamis and earthquakes, the report evaluates the direct and indirect impact on the right to food and on people's livelihoods, how these events contribute to hunger, and what should be done to reduce human rights violations and long-term resource depletion. The Special Rapporteur concludes that despite some of the positive outcomes of the World Humanitarian Summit, there is a need to improve preparedness and to ensure that greater attention is paid to building the resilience of the most affected and vulnerable communities as well as to establishing sustainable food systems. The report also highlights the importance of achieving a real convergence between emergency food aid, food assistance and development cooperation, while ensuring that the right to food both of individuals and of communities is met not only by short-term responses to emergency situations but also with due regard for long-term impacts. In order to achieve these goals, the common understanding among donor communities that humanitarian responses are currently treated as voluntary acts should be replaced by negotiating a legal obligation in the form of a comprehensive, multilateral treaty of general application.

II. Impact of disasters on the right to food

11. Natural disasters and climate change are closely linked. The negative impact of climate change, such as global warming, not only hampers crop, livestock, fisheries and aquaculture productivity, but also influences the frequency of extreme weather events and natural hazards.[4] Those events are expected to become more frequent in coming years, and according to predictions their strength and magnitude are likely to intensify.

12. Intensification and recurrence of natural disasters also magnify their impacts on populations, thereby risking impairment of human rights given that "more frequent and intense extreme weather events will also complicate the logistics of food distribution during emergencies".[5]

13. The years 2015 and 2016 were especially difficult in terms of serious natural disasters. El Niño had devastating effects on countries throughout Southern Africa, leaving 12 million people food insecure.[6] In 2016, El Niño reduced rainfall, causing intense and prolonged droughts in some areas, while heavy rains in other areas created catastrophic floods. These conditions had severe impacts on crop production, livestock, and agricultural livelihoods, reduced agricultural trade and led to food price spikes, especially in countries

[2] Rosamond L. Naylor, "The elusive goal of global food security", *Current History* (January 2018).

[3] World Bank, *Unbreakable: Building the Resilience of the Poor in the Face of Natural Disasters*, (Washington, 2017).

[4] See A/70/287, p. 4.

[5] Ibid.

[6] Food Security Information Network, *Global Report on Food Crises 2017*.

with inadequate capacities to respond and among populations characterized by low resilience.[7]

14. The Secretary-General of the United Nations appointed two special envoys to investigate the impact of El Niño and climate change. Their report asserts that the El Niño episode "severely affected more than 60 million people around the world" and "led 23 countries to appeal for international humanitarian assistance in East and Southern Africa, Central America, the Caribbean and the Pacific. The most vulnerable groups bore the brunt of the emergency, including women, children, the elderly, the disabled and people living with HIV/AIDS."[8]

15. In times of disaster, while the impacts on food availability are often of immediate concern, the gradual effects of natural hazards on accessibility, adequacy and sustainability are of equal importance — they may be less visible and yet more enduring.

1. Availability

16. The agricultural sector and its subsectors are very important for rural people, who farm for both food consumption and income. Although the main impacts vary significantly, depending on the kind of disaster and the region, the total percentage of losses and damage absorbed by the agriculture sector in developing countries has been estimated to be 22 per cent.[9] While crops are more likely to be destroyed by floods and storms, livestock is usually affected by droughts, and the fisheries and aquaculture sector is affected the most by storms, hurricanes and cyclones. At the regional level, drought was at its most harmful in sub-Saharan Africa and the Near East; whereas Asia and Latin American and Caribbean countries were most affected by floods.[10]

17. Natural disasters also destroy essential infrastructure, tools and equipment, irrigation systems, livestock shelters and veterinary facilities. During Hurricane Matthew in Haiti, in some of the worst affected regions, close to 100 per cent of the crops were destroyed.[11] In Puerto Rico, "Hurricane Maria wiped out most of the island's crops. Banana and coffee — the island's most valuable exports — were the hardest hit." Due to the storm, the population faced "immediate food shortages but also long-term consequences from the destruction of the entire agricultural infrastructure".[12]

18. In the context of tsunamis or hurricanes, for example, workers in the fishing sector are themselves at serious risk, while their tools and boats face damage or the risk of being washed away. Following the 2004 tsunami, it was reported that in the Indonesian province of Aceh around 10 per cent of fisherfolk had been killed. In addition, estimates showed that 50 per cent of fishing boats had been either damaged or lost.[13] Following her country visit to the Philippines in 2014 after typhoon Haiyan, the Special Rapporteur reported that fisheries production in the country had declined significantly.[14]

19. The impact of extreme weather events and droughts also affects livestock — from spreading disease to loss of animals. Recent droughts in Ethiopia in 2016 resulted in a high rate of livestock morbidity and mortality, as well as a modification of animals' migration patterns.[15] In Malawi, drought induced by El Niño impacted the production of various

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[7] Ibid., p. 18.

[8] "Preventing El Niño Southern Oscillation episodes from becoming disasters: a 'blueprint for action'" (2016), p. 2.

[9] FAO, *The Impact of Disasters on Agriculture and Food Security* (Rome, 2015), p. 11, available at www.fao.org/3/a-i5128e.pdf.

[10] Ibid., p. 31.

[11] See https://wfp-americas.exposure.co/a-timeline-of-wfps-response-to-hurricane-matthew-in-haiti.

[12] See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22326&LangID=E.

[13] FAO, *"An Overview of the Impact of the Tsunami on Selected Coastal Fisheries Resources in Sri Lanka and Indonesia"* (Bangkok, 2007), p. 31.

[14] See A/HRC/31/51/Add.1.

[15] FAO, *El Niño Response Plan 2016*, p. 10, available at www.fao.org/fileadmin/user_upload/emergencies/docs/FAO-Ethiopia-ElNino-Response-Plan-2016.pdf; and FAO, "Ethiopia situation report — April 2016", available at

cereals, including maize, rice, sorghum and millet, leading to significantly below-average levels of crop production for 2015 and 2016.[16]

20. Seeds are essential to ensure the next planting seasons and future harvests. If not well protected, seeds are likely to be either damaged or completely destroyed.[17] Floods can damage seed storing facilities, and the seeds themselves may become wet, thus jeopardizing their potential use. After the earthquake in Nepal in 2015, it was reported that many seeds had been damaged or lost and that storage facilities had been damaged.[18]

2. Accessibility

21. Natural disasters affect access to food in a number of ways. They contribute to food price inflation in local markets because of scarcity of commodities. They may also lead to increased unemployment or declining wages for farm workers, thus diminishing their purchasing power.[19] Such developments produce an erosion of livelihood, especially in rural areas.

22. In Pakistan in 2010, intense monsoons induced floods, which affected more than 20 million people and seriously impacted the circulation of food commodities inside the country as both roads and the rail network had been damaged.[20] In addition, in some regions a reduction in market capacity was reported, because market sellers' vending and storage facilities had been damaged by the floods.[21]

23. In Lesotho in 2016, El Niño-related drought disturbed the harvest season, leading to low production and food price inflation. In this context, the pressures on livelihoods pushed many households to borrow or to obtain credit in order to buy food, and even drove people to resort to illegal activities.[22]

24. In 2015 and 2016 in Ethiopia, food insecurity, partly caused by El Niño, prolonged intense drought, pushed many small-scale farmers to use last-resort coping strategies such as selling their livestock and agricultural assets.[23] Negative coping strategies have long-term consequences on achieving the right to food. When assets are lost, the already low capacity of small-scale farmers and fisherfolk to invest in quality equipment or seeds may be negatively affected. Some may not be able to reinvest in such assets due to the absence of insurance or the unavailability of credit, and others may decide to go for less sustainable options as regards crop choice or agricultural technology.[24]

3. Adequacy

25. Adequacy requires that food satisfy dietary needs (factoring in a person's age, living conditions, health, occupation, sex etc.) and that it be safe for human consumption, free of adverse substances, culturally acceptable and nutritious. Natural disasters negatively affect food adequacy, especially by potentially causing reductions in the quality of food consumed, which increases prospects of malnutrition.

26. As will be discussed further in the present report, when a natural disaster hits poor communities, the nutritional status of children is a major concern, both in the immediate

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www.fao.org/fileadmin/user_upload/emergencies/docs/FAO%20Ethiopia%20Situation%20Report%20-%20April%202016.pdf.

[16] Food Security Information Network, *Global Report on Food Crises 2017*, p. 83.

[17] Tejendra Chapagain and Manish N. Raizada, "Impacts of natural disasters on smallholder farmers: gaps and recommendations", *Agriculture and Food Security*, vol. 6, No. 1 (2017).

[18] See http://nepal.unfpa.org/sites/default/files/pub-pdf/PDNA_volume_BFinalVersion.pdf.

[19] FAO, *The Impact of Disasters on Agriculture and Food Security*.

[20] WFP, "Pakistan flood impact assessment" (2010), p. 8, available at http://documents.wfp.org/stellent/groups/public/documents/ena/wfp225987.pdf.

[21] Ibid., p. 9.

[22] Food Security Information Network, *Global Report on Food Crises 2017*, p. 75.

[23] Ibid., p. 28.

[24] Anastasia Telesetsky, "An evolving role for law and policy in addressing food security before, during and after a disaster", *Research Handbook on Disasters and International Law*, Susan C. Breau and Katja L.H. Samuel, eds. (Edward Elgar, 2016), p. 265.

aftermath and over the long term. According to WFP, more than 20 per cent of the variation in height in developing countries is determined by environmental factors, particularly by droughts since these have a severe impact on dietary diversity and reduce overall food consumption.[25]

27. Following many kinds of natural disasters, food in the affected areas may become contaminated, with an increase in the risk of foodborne diseases. Poor sanitation, lack of clean water, destruction of infrastructure and lack of suitable conditions for preparing food have led to mass outbreaks of foodborne diseases.[26] Crops can also be contaminated by heavy metals, chemicals, bacteria and mould. In many cases, it is difficult to determine which contaminants are in crops submerged in floodwater.[27]

4. Sustainability

28. Natural disasters can have a long-term impact on the right to food by threatening key environmental resources and entire ecosystems that are vital for sustainable food production. Contamination of soil and water is an important environmental impact of storms, tsunamis and floods. Salinization of water bodies such as rivers, wells, inland lakes and groundwater aquifers affects the fertility of agricultural lands, which reduces crop yields in the medium and long term.[28]

29. Disasters also reduce nature's defence capacity, amplifying the impacts of future hazards. The disappearance of natural barriers, such as forests that provide protection against wind, and mangroves that stave off erosion, are likely to increase the exposure of certain areas to natural hazards.[29] FAO reported that following the floods in Pakistan in 2010, the impact on natural resources included "damaged or destroyed trees, forests and forestlands, plantations, forest nurseries, mangroves, wetlands, wildlife resources and other natural assets that sustain agriculture and livelihoods".[30]

30. Landslides cause significant damage to soil, agricultural infrastructure, seeds and food stocks. Prevention measures such as forest conservation activities or watershed management are important to cope with such situations and prevent erosion.[31]

31. Biodiversity is essential for the preservation of ecosystems. As highlighted in a recent report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, "biodiversity is especially crucial to the stability and resilience of food sources" and contributes to overall food security.[32] While erosion of biodiversity is among the consequences affecting ecosystems in times of disaster, a rich biodiversity "can play a crucial role in disaster risk management before, during and after an event by fostering resistance, building resilience and assisting recovery".[33] Also, direct loss of biodiversity may lessen the availability of wild foods — a coping strategy relied upon by some in response to disasters.[34]

32. Resilience can be built by providing livestock assistance at the onset of emergencies, for instance through vaccination services and by providing mobile feeding stations to facilitate herd mobility. Disbursement of seed banks to help restore farmers' seed systems can also form an effective part of an emergency response, as can facilitating the establishment of microgardens to allow displaced families to cultivate food wherever they

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[25] See www.wfp.org/disaster-risk-reduction/how-disasters-affect-hunger.

[26] World Health Organization, "Ensuring food safety in the aftermath of natural disasters", available at www.searo.who.int/entity/emergencies/documents/guidelines_for_health_emergency_fsadvice_tsunami.pdf?ua=1.

[27] See www.fda.gov/Food/RecallsOutbreaksEmergencies/Emergencies/ucm112723.htm.

[28] See www.sms-tsunami-warning.com/pages/tsunami-effects#.Wiqg_PIN-k4.

[29] FAO, *The Impact of Disasters on Agriculture and Food Security*, p. 17.

[30] Ibid., p. 22.

[31] See www.fao.org/emergencies/emergency-types/landslides/en/.

[32] See A/HRC/34/49, para. 19.

[33] See http://apps.who.int/iris/bitstream/10665/174012/1/9789241508537_eng.pdf.

[34] Ibid.

are, often without having to acquire additional land (e.g. a "garden on the roof" or a "garden in a bag").

33. Providing fishing equipment and training has also proven helpful to people trapped in conflict or natural disasters, who are forced to acquire their own food. Other initiatives focus on ensuring the continued functioning of markets — for example by encouraging traders and providing support to them to supply essential food items and strengthen delivery networks, or by investing in irrigation projects to help sustain agricultural and pastoral livelihoods during times of crisis.

III. Impact of disasters on people with special needs

34. Natural disasters affect the most vulnerable in a disproportionate manner, making the enjoyment of the right to food in disaster and post-disasters contexts even more challenging for those with special needs. More than 75 per cent of the world's poor depend directly on natural resources to sustain their livelihoods.[35] These people have limited savings, depend on agriculture for a living and face increasing exposure to disaster risks. According to the World Bank, poor people are typically more exposed to natural hazards, lose a greater portion of their wealth and are often unable to draw on support from family, friends, financial systems, or even from their government.[36]

35. In particular, marginalized local and traditional communities, such as nomadic and indigenous peoples, as well as peasants, are affected by denial of access to land, fishing and hunting; deprivation of access to adequate and culturally acceptable foods; loss of traditional knowledge; and loss of biodiversity and degraded ecosystems.

36. Subsistence farmers, peasants and indigenous communities tend to be dependent on the lowest-quality land, including hillsides, deserts and floodplains, and often already suffer from chronic food insecurity. They also might not have access to formal social safety nets. In the face of natural disasters, individuals and communities that are already vulnerable have less capacity to cope with natural disasters, and may have to incur crippling debts and resort to other more extreme measures.

37. People with disabilities, the elderly, people living with HIV/AIDS or those who are ill and living in poverty, as well as internally displaced people, migrants and refugees, are exceptionally vulnerable. Natural disasters are one of the major reasons that people leave their homes in search of liveable conditions, often becoming refugees. In her prior report, the Special Rapporteur paid specific attention to internally displaced persons and refugees in the context of conflicts, highlighting potential additional consequences on host communities and affirming that those fleeing were "often forced to leave behind their assets" and their "economic independence may be hampered by the costs of transit, few income opportunities and limited rights in the host State".

1. Children

38. Children face acute vulnerability due to their inherently limited access to food, as they rely on caregivers to ensure their daily food intake, especially in the first 1,000 days of their life.[37] Appropriate nutrition during this window is vital in order to overcome life-threatening childhood diseases.[38] During natural disasters, household income may be seriously diminished, thus affecting caregivers' capacity to fulfil children's basic nutritional needs.

39. According to the United Nations Children's Fund (UNICEF), "an estimated 535 million children — nearly one in four — live in countries affected by conflict or disaster,

[35] FAO, *The Future of Food and Agriculture: Trends and Challenges* (Rome, 2017), p. 68, available at www.fao.org/3/a-i6583e.pdf.

[36] World Bank, *Unbreakable*, p. 26.

[37] Carolyn Kousky, "The future of children", *Children and Climate Change*, vol. 26, No. 1 (2016), pp. 73–92, see pp. 75–76.

[38] See A/71/282, p. 5.

often without access to medical care, quality education, proper nutrition and protection".[39] Children who lack adequate nutriments and vitamins may have long-term impacts on their development and adult life, including impairment of their immune systems that leads to disease, long-term illness or death. In addition, malnourishment exacerbates children's vulnerability to natural disasters.[40]

40. For example, a study has shown that in Peru, after the heavy rainfalls induced by the 1997–1999 El Niño episode, children experienced inadequate growth.[41] The same study also showed that in those areas, at the time of the disasters, households experienced many challenges, including food shortages, lack of adequate health care, lack of clean water, increases in malaria and diarrhoeal diseases, and loss of crops and livestock which led to reduced income.[42]

41. In the Philippines over the last two decades, 15 times more infants have died in the 24 months following typhoon events than as a result of the typhoons themselves — most of whom were infant girls.[43]

42. In November 2017, Viet Nam was hit by a major typhoon that caused direct impacts on the nutritional status of 150,000 children.

43. Studies from Bangladesh show increased wasting and stunting rates among preschool children after floods, due to reduced access to food, increased difficulties in providing proper care and greater exposure to contaminants.[44]

44. According to WFP in Zambia, children born in drought conditions are up to 12 per cent more likely to have below-average height and weight than children born in non-crisis years.

45. In Madagascar, in the summer of 2016, UNICEF reported that "the nutritional status of children (was) still challenged by drought and post-drought conditions". Given limited rainfall, the population faced special challenges — such as puddles where the population collected scarce, yet contaminated, water.[45]

46. Moreover, as a consequence of natural disasters, poor children are likely to be taken out of or prevented from going to school, and pushed into the workforce. After Hurricane Mitch in 1998, in Nicaragua, it was demonstrated that labour force participation increased by 58 per cent (an increase of 8.5 percentage points) among children in areas affected by the hurricane.[46]

2. Women

47. Women and girls worldwide already face many inequalities that are embedded in social practices and laws, constraining their access to resources and affecting their food security and nutrition.

48. As the Special Rapporteur mentioned in her 2016 report (A/HRC/31/51), the vulnerability of women is higher than that of men in post-disaster contexts. In times of natural disaster, women's household responsibilities increase while access to resources decreases. The daily work involved in providing food, water and fuel for households after a disaster requires intensive labour, the bulk of which is borne by women. In many rural areas, women and girls spend the majority of their time engaged in subsistence farming and the

[39] See www.unicef.org/media/media_93863.html.

[40] UNICEF, *Children's Vulnerability to Climate Change and Disaster Impacts in East Asia and the Pacific* (Bangkok, 2011); see also A/71/282, p. 4.

[41] See Carolyn Kousky, p. 79; and Heather E. Danysh and others, "El Niño adversely affected childhood stature and lean mass in northern Peru", *Climate Change Response* 1 (2014), pp. 1–10.

[42] Heather E. Danysh and others, "El Niño adversely affected childhood stature and lean mass in northern Peru".

[43] See www.wfp.org/disaster-risk-reduction/how-disasters-affect-hunger.

[44] Ibid.

[45] UNICEF, "Madagascar: El Niño drought, humanitarian situation report No. 2" (July 2016).

[46] See Carolyn Kousky, p. 86.

collection of water and fuel. As a result of disasters, these tasks become more time-consuming.

49. During the 2015 earthquakes in Nepal, the impact on the traditional division of roles tended to intensify, making the workload of women even greater in a country where women already work up to 16 hours a day.[47] This, in turn, decreases the time available for food production and preparation, and threatens women's health and safety, with consequences for household food security and nutritional well-being.[48]

50. Impacts of decreased water quality as a result of disasters are also gender-differentiated. Women are more physically vulnerable to waterborne diseases due to their role in supplying household water and responsibility for domestic chores. Decreased water resources may also cause women's health to suffer as a result of the increased work burden and reduced nutritional status. For instance, in Peru following the 1997/98 El Niño event, malnutrition among women was a major cause of peripartum illness.[49]

51. It is also important to highlight the fact that climate change itself intensifies psychological stress associated with disasters, increasing women's risks of situations of violence, sexual harassment and trafficking. Because women are forced into prostitution, an increased HIV prevalence exists in drought-ridden areas of rural Africa.[50]

52. Women in refugee camps or in situations where they are internally displaced experience particular difficulties. Women cannot easily flee disasters or dangerous areas when they are pregnant, responsible for children and elderly people or restrained by social mores that inhibit their presence in public spaces or demand restrictive dress. If they do escape the immediate disaster area, women are vulnerable to abuse in camps for refugees or internally displaced persons, including increased risk of sexual and gender-based violence, unequal access to training and economic opportunities, and little or poor reproductive health care. Pre-existing patterns of discrimination against women in these areas are intensified, contributing to violations of women's rights to housing, land and property.[51]

3. People living with HIV/AIDS

53. People living with HIV/AIDS in disaster and post-disaster areas are especially vulnerable, because a lack of food, and especially of basic nutriments, may result in a faster progression from HIV to AIDS.[52] The energy requirements of people living with HIV are higher than for healthy non-infected persons in similar physical condition and of the same age and sex.[53]

54. Sub-Saharan Africa has a high HIV/AIDS rate and suffers from frequent natural disasters. Moreover, rates in HIV-endemic rural areas have increased "by 11 per cent for every recent drought".[54]

55. As UNAIDS mentioned in a recent factsheet focusing on the Eastern and Southern African regions, "risk and vulnerability are often heightened by income shocks and food insecurity — particularly among women and girls — due to a range of factors such as migration in search of work, early marriage of girls and young women to older men to

[47] See http://norlha.org/wp-content/uploads/2015/04/Impact_of_natural_disaster_on_girls_and_women_Norlha_June_2015.pdf.

[48] World Bank, FAO, International Fund for Agricultural Development, *Gender in Agriculture Sourcebook* (Washington, 2009), pp. 455–456.

[49] See A/70/287.

[50] Marshall Burke, Erick Gong and Kelly Jones, "Income shocks and HIV in Africa", *The Economic Journal*, vol. 125, issue 585 (2015), pp. 1157–1189.

[51] See A/HRC/23/44, paras. 21–22.

[52] Fiona Samuels, Paul Harvey and Thobias Bergmann, "HIV and AIDS in emergency situations: synthesis report", Overseas Development Institute (2008).

[53] United States Agency for International Development (USAID), "Nutrition and HIV/AIDS: evidence, gaps, and priority actions" (2004).

[54] UNAIDS, "Building resilience to drought and disease: how UNAIDS is supporting Eastern and Southern Africa in the face of El Niño" (2016).

increase economic security, and transactional sex for food or money".[55] This also engenders higher risks of disease transmission resulting from last-resort coping strategies in some regions.

56. Natural disasters may also contribute to a rising rate of gender-based violence, including of sexual violence,[56] and may increase diseases. Such risks are exacerbated if condoms are unavailable or scarce.[57] Also, mother-to-child transmission, including through breastfeeding, increases under the impact of natural disasters.

IV. Human rights law in disaster settings

1. Disaster response law

57. Natural disasters create large-scale human suffering, and responding properly to disaster situations is challenging. Besides human rights law, other branches of laws, such as disaster response law, humanitarian law, environmental law, climate change law, refugee law, trade law, development law and economic law, as well as non-binding texts and General Assembly resolutions developed by governmental and non-governmental humanitarian actors, contain norms that are of relevance for natural and human-made disasters. Nonetheless, no comprehensive, holistic, multilateral disaster response treaty of general application currently exists.

58. Although the legal landscape is fragmented and uncertain, there have recently been positive moves toward implementing a human rights approach in disaster situations, including in regard to food aid and assistance. A human rights-based approach has crucial advantages in disaster settings, such as avoiding discrimination, prioritizing vulnerable communities, and providing measurable and enforceable obligations through accountability mechanisms. Yet, accountability remains challenging at the national and international levels due to the complexity of the humanitarian system.

Defining emergencies and disasters

59. There is a tendency to exaggerate the distinction between natural disasters and human-made disasters. Most natural disasters cannot be simply defined as "natural", which would effectively release direct and indirect perpetrators from the burdens of responsibility: most of the time the two are linked. Interaction between nature and human activity needs to be better understood conceptually and with respect to policy goals, and on this matter a preventive approach is appropriate in respect of both. Considering that most of the time natural disasters take a heavier toll on poor and underprivileged people, it is important to define what "disaster" means legally and who will be responsible for the consequences of the disaster.

60. The Human Rights Council Advisory Committee, in a recent study, has referred to "emergencies" as situations where, in the context of natural disasters or conflicts, "local families and communities cannot cope with or recover from (the disaster) on their own".[58] The International Law Commission defines disasters as "a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society".[59]

61. From the perspective of food security, "disaster" means that besides directly affecting a large part of the population and impairing the availability of and access to nutritious, culturally acceptable and safe food, the consequences of such events, as indicated earlier, may include the weakening of governance structures, destabilization of

[55] Ibid.

[56] Fiona Samuels, Paul Harvey and Thobias Bergmann, "HIV and AIDS in emergency situations: synthesis report", p. vii.

[57] Ibid., p. 11.

[58] See A/HRC/28/76.

[59] See A/71/10, para. 48.

the food market and the destruction of livelihoods, thus making food-insecure populations even more susceptible to suffering future crises.[60] The occurrence of a disaster usually leads to an emergency response that is ill-suited to addressing root causes or long-term consequences. In fact, emergency responses are part of what may be referred to as the "disaster cycle".[61]

62. Due to the absence of binding legal mechanisms, discrepancies among various interpretations and the increased number of disaster situations worldwide, the International Law Commission has produced 21 draft articles on subjects ranging from the role of the affected State in coordinating an international disaster response to the recognition of human rights in the context of a natural disaster. The Commission's 2016 draft articles on the protection of persons in the event of disasters explicitly adopt a rights-based approach, including the affirmation of human dignity, to address vulnerability in emergencies.[62] The Commission's Special Rapporteur on the topic commented on the debate within the humanitarian community, noting that the "rights-based" and more traditional "needs-based" approaches were not necessarily mutually exclusive, but complementary.[63] Moreover, while he recognizes the primary responsibility of the disaster-affected State, he takes a fresh approach by suggesting that human rights responsibilities might be on the verge of being "deterritorialized" by declaring and establishing an international duty of cooperation.[64] The draft articles clearly remind the international community of the responsibilities of external actors towards disaster-affected people. At the same time, the draft articles primarily cover the rights and obligations of States, as opposed to non-State actors,[65] while they invoke the phrase "international community" to describe the assemblage of relevant actors: third States, intergovernmental organizations and non-governmental organizations (NGOs) that are empowered to offer humanitarian assistance.[66]

63. Unlike the International Law Commission's draft articles, the dominant view for international community disaster relief is still based on voluntarism and assumes that disaster-affected people remain dependent on the vagaries of altruism, which is often unreliable, politically partisan, and arbitrary.[67]

64. It is notable that the Human Rights Council Advisory Committee report (A/HRC/28/76) does not refer to the work of the International Law Commission on the protection of persons in the event of disasters, nor to the work on the international legal obligations of States and non-State actors undertaken by the Commission's Special Rapporteur. For a truly coordinated approach within the United Nations regarding human rights norms, it is essential to achieve cross-fertilization of concepts, research and activities.[68]

2. The human rights system

65. Various United Nations Charter-based and treaty-based mechanisms, as well as institutional arrangements and procedures such as the International Law Commission, the Human Rights Council and its universal periodic review process, the thematic mandates

[60] FAO, "The right to adequate food in emergency programmes" (Rome, 2014), p. 3.

[61] Daniel A. Farber, "International law and the disaster cycle", *The International Law of Disaster Relief*, (Cambridge University Press, 2014), p. 9.

[62] See A/71/10, para. 48.

[63] Commentary on art. 2.

[64] Therese O'Donnell and Craig Allan, "Identifying solidarity: the ILC project on the protection of persons in disasters and human rights", *George Washington International Law Review*, vol. 49, No. 1, pp. 53–95 (2016).

[65] Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", *Netherlands Quarterly of Human Rights*, vol. 33/1 (2015), p. 18.

[66] See A/71/10, p. 70.

[67] Therese O'Donnell and Craig Allan, "Identifying solidarity: the ILC project on the protection of persons in disasters and human rights".

[68] Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", p. 24.

and the treaty-body monitoring committees, address the linkages between human rights and disasters, although not in a coordinated or consistent manner. General human rights provisions can apply to disaster-affected populations, but they are not focused upon the typical difficulties arising from disasters.[69] Instead, each and every human rights violation, such as access to food, clean water, health and shelter, is considered separately, without taking the broader context into account, including communal stress.

66. The United Nations human rights system did not address natural disasters in a systematic manner until 2013. Human Rights Council resolution 22/16, calling for research on best practices and challenges in the promotion and protection of human rights in post-disaster and post-conflict situations, is the first formal act of recognition relating to the human rights implications of natural and human-made disasters. However, pre-disaster preparedness is not addressed in the text.

67. The same year, General Assembly resolution 67/87 focused on the accountability of humanitarian actors. Considering that numerous human rights violations can occur as a result of humanitarian operations — including unequal access to assistance, discrimination in aid provisions, enforced relocation, sexual and gender-based violence, loss of documentation, recruitment of children into fighting forces, unsafe or involuntary return or resettlement, and issues of property restitution — the accountability of humanitarian actors is vital.[70] The invocation of the Convention on the Privileges and Immunities of the United Nations by the Secretary-General to avoid potential compensation claims against the United Nations for the introduction of cholera by United Nations peacekeepers following the Haiti earthquake illustrates the difficulty of establishing accountability mechanisms applicable to humanitarian actors.[71]

State obligations

68. As the Committee on Economic, Social and Cultural Rights has pointed out, "States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations … to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities."[72] It is important to note that the recognition of the indivisibility of the rights in regard to disaster is part of the emerging jurisprudence on State responsibility.[73] In times of emergency, unlike with civil and political rights, there is no derogation clause to suspend State obligations pertaining to the right to food, as well as other economic, social and cultural rights.[74]

69. The right to food in emergencies needs positive action by States not only to respect and protect, but also to fulfil the normative content of international human rights principles. The obligation to fulfil requires States to take affirmative steps to facilitate the capacity of its people to feed themselves, identifying, in particular, its most vulnerable populations to ensure their access to food, and supplying food directly when individuals or groups are unable, for reasons beyond their control (e.g. natural disasters and armed conflict), to secure adequate food through their own means and resources. Article 11 of the Covenant does not make any differentiation about the causes of difficult times in relation to State obligation.[75]

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[69] Therese O'Donnell and Craig Allan, "Identifying solidarity: the ILC project on the protection of persons in disasters and human rights".

[70] Inter-Agency Standing Committee, *Operational Guidelines on Human Rights and Natural Disasters* (June 2006), p. 8.

[71] Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", p. 23.

[72] See Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, paras. 40 and 65, and general comment No. 12 (1999) on the right to adequate food, para. 38.

[73] Cubie and Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", p. 16.

[74] See Committee on Economic, Social and Cultural Rights, general comment No. 12, para. 6; and A/72/188, paras. 48–50.

[75] See A/72/188, paras. 47–61.

70. The Committee on Economic, Social and Cultural Rights, in its general comment No. 19 (2007) on the right to social security, also deals with the human rights implications of financial preparedness for disasters, stating that States parties should consider establishing insurance schemes, such as crop or natural disaster insurance, which are accessible by the victims of a disaster.[76] Although the Committee recognizes that various human rights in the International Covenant on Economic, Social and Cultural Rights need particular action by States in the context of disasters, and has started to clarify obligations in this regard, it has not yet provided specific guidance on the human rights implications of natural disasters in the form of a dedicated general comment, which would be a helpful further step.[77]

71. When a State, which bears the primary duty, is unable or unwilling to provide humanitarian assistance to its suffering population, then other States and NGOs have a subsidiary responsibility to act. These multidimensional challenges have to be taken care of through disaster relief and humanitarian assistance.[78]

72. Even though external humanitarian assistance should be provided upon request of the States affected by natural disasters, or at least with their consent, States' arbitrary refusal to receive humanitarian assistance should be treated as a violation of international human rights law. Indeed, general comment No. 12 of the Committee on Economic, Social and Cultural Rights includes, among the violations of the right to adequate food, "the prevention of access to humanitarian food aid in internal conflicts or other emergency situations".[79] Moreover, where the denial would threaten the lives of the affected population, the State would be in violation of the right to life. In fact, in 2008, when Cyclone Nargis struck Myanmar, the military regime initially rejected all offers of international humanitarian assistance. This reignited a debate over the apparent conflict between the right of a sovereign State to refuse assistance and the right of people to receive humanitarian relief in the context of natural disasters. Some controversially contended that Myanmar's neglecting or refusing to accept humanitarian assistance could amount to a crime against humanity.[80]

Treaty bodies

73. Treaty bodies also deal with disaster situations, in relation to specific areas of protection. The Committee on the Elimination of Discrimination against Women has raised concerns to the Government of Indonesia on issues relating to rural women's protection and access to assistance, in response to tsunamis and earthquakes. Furthermore, the Committee has expressed concern about the impact of tsunamis and earthquakes in Chile, urging that reconstruction plans take a gender perspective into proper account.[81]

74. Similarly, the Committee on the Elimination of Racial Discrimination, which monitors the International Convention on the Elimination of All Forms of Racial Discrimination, expressed concern regarding Hurricane Katrina, in the United States of America, critically noting the slow and inadequate protection of the right to housing after the hurricane, especially for low-income African Americans.[82]

75. The Committee on the Rights of the Child has recommended that effective protection of children include: (a) the implementation of disaster preparedness in school curricula; (b) the development and implementation of action plans or strategies on assistance and protection; and (c) the setting up of "strategic budgetary lines" protecting

[76] See paras. 28–50.

[77] Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", p. 27.

[78] Committee on Economic, Social and Cultural Rights, general comment No. 12, para. 38.

[79] Ibid., para. 19.

[80] Matias Thomsen, "The obligation not to arbitrarily refuse international disaster relief: a question of sovereignty", *Melbourne Journal of International Law*, vol. 16 (2015), p. 3.

[81] Cited in Dug Cubie and Marlies Hesselman, "Accountability for the human rights implications of natural disasters: a proposal for systemic international oversight", p. 28.

[82] Ibid.

vulnerable and disadvantaged children "even in situations of economic crisis, natural disasters or other emergencies".[83]

76. Finally, the Committee on the Rights of Persons with Disabilities has created informal working groups to monitor the protection of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and natural disasters.[84]

V. Food assistance and the role of the international community

History and structure

77. Food assistance is one of the oldest forms of international support and it has saved many lives during severe humanitarian crises. It is a remedy for emergency situations, to provide food for those who are caught in the midst of a disaster situation.

78. At the same time, poorly designed, charity-based food aid can do more harm than good, can have negative effects on small-scale farmers in recipient countries by exerting downward pressure on domestic food prices, and can adversely affect trade, production incentives and labour markets. In some cases, food aid practices might even violate the right to food, if the food aid were distributed unfairly or if the most vulnerable were not prioritized. Food aid should serve the best interests of recipient country's food and agricultural policy, provide long-term livelihoods for people and uphold environmental best practices. The very simplistic "if people are hungry, we should simply give them food" argument, which is frequently heard, is an example of inappropriate use of food aid.[85] Volunteerism with respect to food assistance is also humiliating to the recipients, and by definition inconsistent and frequently manipulated for political gain.

79. In the 1950s, food aid was dominated by the United States, Canada and Australia, which together accounted for over 90 per cent of the total. During the cold war, international commitments to food aid were only partly about humanitarianism, being often driven by high-priority geopolitical and economic interests. The food aid programmes of that era largely provided grain in the form of bulk commodities — often agricultural surpluses that were accumulating in donor countries.[86]

80. In the 1970s, the European Community and Japan also began to provide international food aid. Since then, the European Union has become the second-largest food aid donor. One third of the European Union's annual humanitarian aid budget is used to provide emergency food assistance. The European Union has a flexible policy that it adapts to specific cases by providing cash-based as well as in-kind assistance.

81. Although official development assistance (ODA), emergency humanitarian aid, food aid and food assistance have different targets, priorities and funding, and are run by different organizational structures, all three programmes have significant impacts on the local economy, on the local agricultural structure, and on people's right to food, both individually and as a community. Most of the time, long-term recipients of ODA and food aid/assistance become dependent in ways that impede balanced, sustainable development.

82. Over the last 50 years, the character of food aid policies and practices has changed, in parallel to global structural changes in agriculture and changing geopolitical conditions. Firstly, the absolute value and relative importance of food aid has declined dramatically. In the 1960s, food aid represented approximately 20 per cent of all ODA, but by the early 2000s that figure had fallen to about 5 per cent.[87]

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[83] Ibid., p. 29.

[84] Ibid.

[85] Christopher B. Barrett and Daniel G. Maxwell, *Food Aid After Fifty Years: Recasting its Role* (New York, Routledge, 2005).

[86] Jennifer Clapp, *Hunger in the Balance: The New Politics of International Food Aid* (Cornell University Press, 2012).

[87] Jennifer Clapp, "Food aid", *Handbook of Globalisation and Development* (2017), p. 394.

83. Secondly, in the aftermath of the cold war, donors began to direct their food aid or assistance towards the poorest countries, rather than prioritizing geopolitical considerations. More frequent, more severe and longer-lasting human-made and natural disasters worldwide have refocused food aid on the challenge of feeding emergency victims. By the early 2000s, over 60 per cent of food aid was in response to emergency situations.[88] In recent years, 80 per cent of disasters have been climate change-related extreme weather events, which have severely hit places that already have food insecurity, such as countries in South Asia, sub-Saharan Africa, the Middle East and Central America. Yet, those countries' contribution to global warming is close to zero. Therefore, disaster relief systems and humanitarian aid almost go hand in hand with climate change policies, and should be factored into adaptation and mitigation remedies.[89]

84. Thirdly, donor countries have gradually moved from direct transfer of commodity surpluses to sourcing food aid on open markets. The United States, as the biggest donor, provides roughly 50 per cent of all food aid worldwide, reaching approximately 50 million people in 56 countries at an average annual cost of US$2 to 3 billion. But in real terms, the food aid budget of the United States is less than a third of what it was in 1965. The United States spends more than half of its international food aid budget transporting life-saving commodities through a complex system that is responsive to special interests and hampered by bureaucratic obstructions.[90] As Oxfam has documented, such a process is outdated and inefficient from the perspective of getting food to people in need.[91] During sudden emergencies such as the earthquake in Haiti and the hurricane in Puerto Rico, delays cost lives. In recent years, several reform efforts have been taking place to correct such situations.

85. As part of the larger humanitarian structure, food assistance intrinsically suffers from more general shortcomings that plague the humanitarian system. Rather than being carefully coordinated and deliberately engineered, the humanitarian structure evolved from fragmentary endeavours and is composed of a multitude of autonomous entities with separate governance and accountability structures — including NGOs,[92] United Nations humanitarian agencies, the International Red Cross and Red Crescent Movement, recipient and donor government agencies, humanitarian arms of regional intergovernmental organizations, military forces, religious institutions and private sector entities.[93] This disparate system, which lacks leadership and coordination, is susceptible to inefficiencies, poor communication, bureaucratic restrictions, corruption, and costly duplicative administrative systems that prevent rapid, flexible and effective responses to changing needs.[94]

86. Funding shortages are an important concern as the number of disaster- and conflict-prone areas is increasing. Donor countries have promised to spend 0.7 per cent of their gross national income as aid. According to Organization for Economic Cooperation and Development records, many rich countries have failed to reach their agreed obligations; only a few have met their commitments.[95]

87. Food from supply-driven rather than demand-driven food aid programmes frequently goes to people who do not want to eat it, do not know how to cook it or have no real use for it.[96, 97] Furthermore, the quality of the food has been often contentious, with

[88] Ibid.

[89] See A/70/287.

[90] For instance, in the case of Africa, 70% of the budget goes on transportation. See Medill and *USA Today*, "Hunger pains: U.S. food program struggles to move forward".

[91] See www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/food-aid/.

[92] Some financially powerful NGOs are World Vision, CARE and Catholic Relief Services.

[93] Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), *The State of the Humanitarian System*, 2015 edition, p. 19.

[94] ALNAP, *The State of the Humanitarian System*, 2015 edition.

[95] See www.oecd.org/dac/financing-sustainable-development/development-aid-rises-again-in-2016-but-flows-to-poorest-countries-dip.htm.

[96] Rob Bailey, Chatham House, cited in "Hunger pains: U.S. food program struggles to move forward".

respect to genetically modified seeds, or the provision of fortified foods that have never been tested on large populations.

Food Assistance Convention of 2012

88. The Food Assistance Convention, of 2012, is the only legally binding international treaty addressing "the food and nutritional needs of the most vulnerable populations" in emergency situations.[98] It has in fact has been in operation since 1967 and has been continuously reformulated over the years. In 1991, there was a fundamental shift in approach, expanding the traditional focus on tied in-kind food aid to a much broader form of assistance that included a stronger focus on the nutritional aspects of food aid, the protection of livelihoods, and the use of cash transfers and vouchers.

89. In 2012, there was a change in the convention's title from "aid" to "assistance", revealing a certain shift. Longer-term development assistance seems to be reflected through the 2012 Convention's change in the emergency framework, which includes all forms of food assistance. This has the potential to prevent distortions of local markets and to generate benefits for local producers, thereby combining emergency responses with broader development goals of food security in recipient countries.

90. This change appears to have been shaped by previous international commitments, most notably the Paris Declaration on Aid Effectiveness, of 2005, which placed strong emphasis on recipient countries' ownership of their development policies and strategies while at the same time recognizing the responsibility of donors to take account of food policies in recipient countries.[99]

91. The shift towards assistance, with greater possibilities for beneficiaries' participation, and explicit recognition of the right to food, suggests that the Food Assistance Convention has the potential to contribute to developing a governance regime.[100] However, a number of areas of reform stand out. For instance, the extent to which beneficiaries have actually participated in practices and policies relating to food assistance remains unclear.[101] Similarly, beneficiary States can now also become parties to the Convention, but while a number of non-State parties have attended sessions of the Food Assistance Committee as observers, no beneficiary countries have yet become parties to the Convention.

Right to food approach

92. The 2012 Convention has an explicit reference to the right to food.[102] It has been observed that there is increasing recognition generally among donor States of the usefulness of a human rights lens when addressing issues of food insecurity.[103] Acknowledging the right to food in the preamble is indeed a positive step, however the preamble emphasizes the role of beneficiary States and not of donor States.[104] The Convention also adds a new reference to upholding the dignity of the beneficiaries of assistance, indirectly invoking this fundamental underpinning human rights principle.[105]

93. Similarly, several provisions of the Convention draw upon the text of the 2004 Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, of 2004. Both the Voluntary Guidelines and the

[97] Frederic Mousseau, "Food aid or food sovereignty? Ending world food hunger in our time" (The Oakland Institute, 2005).

[98] Ratified by Austria, Canada, Denmark, Finland, Japan, Switzerland and the United States, and by the European Union, in 2012.

[99] See the Paris Declaration on Aid Effectiveness, para. 14.

[100] See the Food Assistance Convention (2012), art. 2 (c) (ii).

[101] See www.foodassistanceconvention.org/downloads/sumrec/fac2015nr.pdf, pp. 6–16.

[102] See the Food Assistance Convention, preamble.

[103] See www.tafad.org.

[104] Annamaria La Chimia, "Food security and the right to food: finding balance in the 2012 Food Assistance Convention", *International and Comparative Law Quarterly*, vol. 65, No. 1 (2016), pp. 99–137.

[105] See the Food Assistance Convention, art. 2 (c) (iv).

2012 Convention recognize the importance of targeting vulnerable groups for food assistance (art. 2 (c) (i) of the Convention), supporting the long-term food security objectives of beneficiary States (art. 2 (a) (ii) of the Convention), supporting the long-term rehabilitation and development objectives (art. 2 (a) (ii) of the Convention), avoiding dependency on food assistance (art. 2 (a) (iv) of the Convention) and preventing disruption of local food production (art. 2 (a) (v) of the Convention).

94. By translating elements of the Voluntary Guidelines into principles to guide parties' interventions, the 2012 Convention is constructing the foundation of an increasingly rights-based perspective applicable to emergency assistance. The 2012 Convention can provide an example of how the "State duty to assist" can be fulfilled in a specific context.[106]

95. Although the principles of assistance reflect a rights-based approach, it is difficult to measure their current impact on parties' practices. An ad hoc example of compliance is seen in the Food Assistance Committee's 2016 annual report, in which the European Union's activities in West Africa following the Ebola crises focused on the communities most affected by the disease, in compliance with the principle of giving priority to vulnerable groups in line with article 2 (c) (i) of the 2012 Convention. However, recent research shows that with respect to food assistance to the Syrian Arab Republic between 2012 and 2015, the Convention was not mentioned at all.[107] In the 100 interviews conducted with representatives of humanitarian organizations engaged in food assistance in the region, interviewees did not regard the Convention as an important consideration.

96. The Convention also does not contain an effective evaluation mechanism. Its article 2 (d), on principles of food assistance accountability, leaves evaluation to the parties, and the Convention does not refer to a systematic mechanism for monitoring and evaluating the outcomes and impact of assistance interventions (see art. 2 (d) (ii) of the Convention).

97. Considering the increased role of private entities, States should follow the Guiding Principles on Business and Human Rights (pillar I) with respect to interventions of private sector partners in emergency contexts. This is relevant to the role of States parties in developing legislation, monitoring and enforcing domestic obligations. Private companies should also align their interventions with the Guiding Principles (pillar II). Recent guidance is provided in Committee on Economic, Social and Cultural Rights general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. The Committee on Economic, Social and Cultural Rights is well placed to request information from national governments as to their compliance with extraterritorial obligations.

World Humanitarian Summit

98. In May 2016, the first World Humanitarian Summit was convened by the United Nations to develop a more global, accountable and robust humanitarian system, and for reform of the humanitarian aid industry. The World Humanitarian Summit has been groundbreaking, as it has encouraged more flexible funding, greater local ownership and greater accountability. Agreements were made to use less earmarking, to make greater use of cash transfers and to raise the ceiling of the Central Emergency Response Fund.

99. Despite clear evidence that preparedness, early warning, and monitoring systems save lives, targeted funding by the international community remains weak. Between 1991 and 2010, less than 0.5 per cent of ODA was spent on disaster risk reduction, and only a fraction of that was spent on preparedness.[108] Recognizing this shortcoming, the new Global Partnership for Preparedness was launched at the World Humanitarian Summit to provide predictable funding. However it has already met serious obstacles, with not a single State

[106] Annamaria La Chimia, "Food security and the right to food: finding balance in the 2012 Food Assistance Convention".

[107] José Ciro Martinez and Brent Eng, "The unintended consequences of emergency food aid: neutrality, sovereignty and politics in the Syrian civil war, 2012-2015", *International Affairs*, vol. 92, No. 1 (2016), pp. 153–173.

[108] Jan Kellett and Alice Caravani, "Financing disaster risk reduction: a 20-year story of international aid" (Overseas Development Institute, 2013).

having pledged to provide long-term funding and donors continuing to be hesitant about making unearmarked contributions to such a common fund. [109]

100. While in many instances it is too early to assess how the wide-ranging set of commitments will be implemented and monitored, the first progress reports illustrate mixed results. Progress has been uneven, with most developments focusing on localization, cash programming and improved linkages with private sector networks, with less progress on participation and earmarking.[110]

101. Considering the humanitarian sector's structural deficiencies, critics argue that the limits of possible reform have been reached. They have, for example, condemned the Summit for failing to agree on meaningful structural reform of the United Nations system,[111] and some are calling for a radical rethinking of the entire humanitarian system to make it more anticipatory, adaptive, participative and accountable. The wide-ranging suggestions include a unified United Nations "super emergency agency"; the establishment of a centralized capacity at the international level to provide stronger leadership; or alternatively, a major devolution to local and regional levels to make operating modalities more responsive to realities on the ground.

VI. Conclusions and recommendations

A. Conclusions

102. **Climate-related disasters are increasing in frequency and intensity. Their number has almost doubled in the past decade (there are now, on average, 335 events annually). Their impacts can be devastating for any State, even a wealthy one. In 2017, overall losses from storms and fires in the United States and widespread flooding in South Asia reached $330 billion.[112] Hurricane Harvey in Texas was the most expensive natural disaster in 2017, costing $85 billion. The impact on agriculture from devastating wildfires in California is yet to be calculated.**

103. **Territory with poor infrastructure, a deprived population, compromised building safety standards and an underresourced health system undoubtedly add to the human suffering resulting from severe natural disasters. In 2017, Hurricanes Irma and Maria caused significant damage in Cuba, Haiti and Puerto Rico. The drought in the Horn of Africa pushed more that 11 million people into severe food insecurity in Ethiopia, Kenya and Somalia. Flooding in Nepal and Bangladesh left 10 million people food-insecure.**

104. **Many of the negative effects of disasters may be prevented with appropriate planning and investment in infrastructure, or if the root causes are dealt with properly and take vulnerability variations into account. Most of the weather-related disasters that are "often dismissed as 'climatic accidents' turn out to be not so accidental at all".[113] Therefore, effective and meaningful policies and regulations require "a much more holistically minded approach which recognizes historical contingencies and wealth inequality".[114]**

105. **Severe food insecurity can be averted or substantially reduced if the right investments in agriculture are made in post-disaster periods. This would require, both more typical humanitarian "emergency" responses as well as "development" and capacity-building activities. Even at the earliest stages of a response, when the**

[109] Matthew Serventy and Petra Jaervinen, "Global Preparedness Partnership: update on progress since the World Humanitarian Summit".

[110] Global Public Policy Institute, "Independent grand bargain report", 8 June 2017.

[111] See www.irinnews.org/analysis/2016/05/26/world-humanitarian-summit-winners-and-losers.

[112] See www.nytimes.com/2018/01/04/climate/losses-natural-disasters-insurance.html.

[113] Therese O'Donnell and Craig Allan, "Identifying solidarity: the ILC project on the protection of persons in disasters and human rights".

[114] Ibid.

emphasis is on providing urgent life-saving food assistance, it is crucial to strengthen the resilience of the communities affected.

106. Food assistance, although having a vital role as part of the humanitarian system, suffers from serious financial constraints and lack of coordination. Solving chronic hunger in a situation of natural disasters combined with other calamities requires various forms of assistance — deploying a range of humanitarian, economic, political and even military tactics. This will only be possible if there are coordinated political and financial commitments by developed countries. The effects of such disasters can be overwhelming, with historically high numbers of victims in terms of migrants and refugees forced to leave their homes.

107. The root causes of food insecurity in the context of natural disasters and post-disaster settings needs to be understood and addressed together with other global problems. Climate change has long-term and deeper impacts on food insecurity that eventually could bring conflicts to countries that have limited capacity to cope, which could then become trapped in a vicious cycle of conflict, disaster and food insecurity. At the same time, while such countries have contributed only minimally to greenhouse gas emissions, most of the countries that donate to food assistance are significantly responsible for climate change. Therefore, increasing finance to support developing countries in tackling climate change impacts, through adaptation and by addressing loss and damage, is essential.

108. Recognizing the negative impacts that human rights violations have on the effectiveness of relief operations, humanitarian reform efforts are increasingly seeking to incorporate a rights-based approach in the programming, targeting and distribution of food assistance. Beyond the implicit ideas of the interdependence and indivisibility of human rights, the participation of affected populations in decision-making processes, cultural appropriateness, non-discrimination, the protection of vulnerable groups, and gender-based assessments will be helpful to improve fragmented systems and to reform disaster management governance.

109. It is important to consider the right to food as a collective right as well as an individual right, as disasters and emergency situations have an impact on society as a whole, as well as on distinct communities. This approach can be found in several United Nations instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration on the rights of peasants and other people working in rural areas, article 11 of the International Covenant on Economic, Social and Cultural Rights, the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), and agenda 21, chapter 26, from the 1992 United Nations Conference on Environment and Development (Rio Summit).

110. Interpreting the right to food in a humanitarian context as a collective right would give a holistic approach to improving food systems, provide additional legal protection to communities for their access to resources and assets, protect and strengthen traditional food systems and local knowledge, coincident with recovering from emergencies. In other words, emergencies offer an opportunity to introduce food sovereignty principles as part of the human right to food while dealing with disaster and post-disaster recovery efforts. It is essential that disasters should not be treated by donors as an opportunity to change traditional food and agricultural systems and impose industrial agriculture. On the contrary, while responding to the most urgent food needs, post-disaster contexts should be an occasion to support or introduce food sovereignty that primarily supports locals, smallholder farmers, fisherfolk, indigenous communities, and women.

B. Recommendations

111. **With a view to achieving an integrated and systemic approach to the right to adequate food in disaster and post-disaster contexts, the Special Rapporteur recommends that States:**

(a) **Develop national laws and monitoring systems on disaster management (prevention, response and recovery) to incorporate a human rights-based approach;**

(b) **Adopt necessary legislative and budgetary measures to focus on prevention and disaster risk reduction measures, in order to avoid environmental degradation and consequences on ecosystems and biodiversity, which should include forest conservation activities and watershed management;**

(c) **Develop legislation and monitoring and enforcing mechanisms at the national level following the Guiding Principles on Business and Human Rights with respect to the participation of the private sector in emergency contexts;**

(d) **Regulate and monitor agricultural investments in disaster settings, privileging local ownership and food sovereignty and not interfering with the local market;**

(e) **Consider establishing "crop and natural disaster insurance" that is accessible for victims after a disaster, and adopting measures for the protection of seeds;**

(f) **Prioritize the needs of the most vulnerable, especially children, and those most at risk, by setting up budgetary priorities that apply even in situations of economic crisis or natural disaster or other emergencies;**

(g) **Set policies that pay particular attention to the role of women in disaster and post-disaster situations, acknowledging their transformative role and leadership capacity.**

112. **Further, the international community should:**

(a) **Enhance coordination between existing humanitarian institutions, and between United Nations bodies that each have specific mandates but none of which exclusively deals with disaster settings, in order to regulate the entire system;**

(b) **Consider the negotiation of a comprehensive, multilateral treaty to respond to disaster situations in a coordinated and effective manner. The treaty should:**

- **Remind States that they bear a responsibility to protect people and the environment in times of severe emergency and large-scale natural disaster, rather than relying on voluntarism;**
- **Acknowledge that such obligations should be aligned with human rights principles sensitive to justice, human dignity and equality;**
- **Establish a centralized institution at the international level to provide stronger leadership with respect to the humanitarian agenda;**
- **Provide innovative funding mechanisms to close the financial gap;**
- **Establish accountability mechanisms for all humanitarian actors, including NGOs and private sector actors.**

113. **The Committee on Economic, Social and Cultural Rights should prepare a general comment focused on human rights remedies in times of disaster and in post-disaster situations, as well as on preventive measures to clarify the obligations of States and international communities.**